

No. 03-21-00472-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT OF TEXAS IN AUSTIN, TEXAS

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Clerk

In re ROUND ROCK INDEPENDENT SCHOOL DISTRICT, BOARD OF TRUSTEES
OF ROUND ROCK INDEPENDENT SCHOOL DISTRICT, DR. HAFEDH AZAIEZ, in
his official capacity as superintendent of the Round Rock Independent
School District, and AMY WEIR, AMBER FELLER, TIFFANIE HARRISON, DR.
JUN XIAO, DR. MARY BONE, CORY VESSA, AND DANIELLE WESTON, in their
official capacities as trustees of the Round Rock Independent School
District,

Relators.

On Petition for Writ of Mandamus
to the 368th Judicial District Court, Williamson County

PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

Nature of the Underlying Proceeding

In August 2021, Round Rock Independent School District implemented a mask requirement for its students, staff, and visitors to mitigate the spread of COVID-19. On September 9, 2021, the State of Texas filed an Original Petition and Applications for Temporary and Permanent Injunctive Relief against Relators Round Rock ISD, its Board of Trustees, and its Superintendent and individual Board members in their official capacities. R. 1–37. The State seeks a declaration that Round Rock ISD’s mask requirement violates the Governor’s executive order GA-38 and injunctive relief rescinding and prohibiting enforcement of Round Rock ISD’s mask requirement. After filing its Petition, the State sought an *ex parte* temporary restraining order against the Relators.

The Respondent

The Honorable Rick J. Kennon, presiding in the 368th Judicial District Court, Williamson County, Texas.

Respondent’s Action

On September 14, 2021, the Honorable Rick J. Kennon entered an *ex parte* Order Granting State of Texas’s Application for a Temporary Restraining Order without a hearing or an explanation why the Order was issued without notice to the Relators or why the alleged harm to the State is irreparable. R. 38–40 (App. 1–3).

STATEMENT OF JURISDICTION

A court of appeals “may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against” a judge of a district court “in the court of appeals’ district.” TEX. GOV’T CODE § 22.221(b)(1). An original appellate proceeding seeking a writ of mandamus is properly initiated by filing a petition with the clerk of the appropriate appellate court. TEX. R. APP. P. 52.1. The 368th Judicial District in Williamson County is within the Third Court of Appeals’ appellate district.

ISSUES PRESENTED

Whether the trial court clearly abused its discretion in entering an *ex parte* temporary restraining order without notice, without a hearing, and without explanation for why it was issued without notice to the Relators or why the alleged harm being addressed is irreparable.

I.
INTRODUCTION & STATEMENT OF FACTS

The State of Texas sought, and the trial court issued without hearing, an *ex parte* temporary restraining order (“TRO”) against Relators (collectively referred to as “Round Rock ISD” or “the District”). This extraordinary relief was not only granted in an improper manner, but also constitutes a clear abuse of the trial court’s discretion. The TRO on its face violates the Texas Rules of Civil Procedure because it does not provide reasons why the order needed to be granted without notice to the District or why the alleged harm to the State is irreparable. Those violations render the Order void. And by granting the TRO before Round Rock ISD’s Interim General Counsel was notified and without giving her an opportunity to appear (or send external counsel to appear), the trial court violated Williamson County Local Rules. Both mistakes constitute abuses of discretion in an interlocutory order, which the District cannot adequately remedy through ordinary appeal. Round Rock ISD is being harmed every minute that this unlawful TRO is in effect, so it asks this Court to vacate or reverse the TRO through a writ of mandamus.

By this TRO, the State seeks to enforce the Governor’s executive order GA-38. GA-38 purports to ban independent school districts from

requiring masks to be worn on school premises. R. 22–26. The legality of GA-38 as applied to independent school districts has been the subject of extensive litigation, resulting in several temporary injunctions against enforcing GA-38’s prohibition on school mask mandates. Of particular relevance here, on August 12, 2021, a collection of independent school districts from around the state sued the Governor in the 353rd Judicial District in Travis County, *La Joya Independent School District, et al., v. Abbott*, Cause No. D-1-GN-21-003897 (the “School District Lawsuit in Travis County”), arguing that the Governor lacked the authority to ban them from requiring masks and that GA-38 was invalid and unconstitutional to the extent that it purported to do so. A group of Travis County residents with children in public schools intervened as plaintiffs in the School District Lawsuit in Travis County on August 13th, attacking the validity of the ban on mask mandates as it applied to all independent school districts in Travis County.

On August 15, 2021, the trial judge in the School District Lawsuit in Travis County issued a temporary restraining order preventing the Governor from enforcing GA-38 against any public schools located within Travis County. App. 41–44. Meanwhile, on August 13th, the County

Judge of Travis County had also issued an order, which remains in effect, requiring students, staff, and visitors at all public schools in Travis County to wear masks.¹ The trial judge’s TRO in the School District Lawsuit in Travis County remained in effect until August 27th, when she issued a temporary injunction containing the same prohibition on the Governor’s enforcement of GA-38’s mask provisions against the school districts that were parties to the suit and any school district located within Travis County. App. 56–60.

The August 27th temporary injunction was automatically stayed shortly after it was issued, and that appeal, presenting the same legal question as here—whether GA-38 is valid to the extent that it purports to prohibit the school district parties and other school districts in Travis County from implementing mask requirements—is currently pending before this Court as Cause No. 03-21-00428-CV.

¹ See COUNTY JUDGE AMENDED ORDER 2021-08A (Aug. 13, 2021), available at <https://www.traviscountytexas.gov/images/County-Judge-Order-2021-08a.pdf> (last visited Sept. 17, 2021) (App. 35–40). Additionally, on August 24, 2021, the Travis County Commissioners Court issued a Resolution and Order “mandating continued compliance with local health authority orders” that reaffirmed the school mask order and included more detailed guidance. See Resolution and Order of the Travis County Commissioners Court (Aug. 24, 2021), available at https://countyclerk.traviscountytexas.gov/images/pdfs/Resolution_and_Order_.pdf (last visited Sept. 17, 2021) (App. 45–55).

Round Rock ISD is located in both Travis and Williamson Counties. So while not a party to the School District Lawsuit in Travis County, it was covered by the Travis County trial judge's injunctions, as well as the County Judge's school mask order. On August 16, 2021, after consulting with officials from both counties regarding the COVID-19 threat level, Round Rock ISD implemented a mask requirement as part of its COVID-19 safety protocols.² On August 24th, the District clarified the details of its mask requirement and noted that the Texas Education Agency had publicly declared that it would not enforce GA-38's ban on school mask requirements while litigation over its validity was pending.³

From August 16th to September 9th, Round Rock ISD had a mask requirement in place, but neither the Governor nor the Attorney General nor State (who were joined as defendants in the School District Lawsuit in Travis County by August 19th) took any action against it. The State did not seek to join Round Rock ISD to the School District Lawsuit in

² FALL 2021 COVID-19 PROTOCOLS, ROUND ROCK INDEP. SCH. DIST. (Aug. 16, 2021), available at [https://go.boarddocs.com/tx/rrisd/Board.nsf/files/C5XQBB682131/\\$file/D2.COVID-19%20Protocols%20Aug.%2016%2C%202021.pdf](https://go.boarddocs.com/tx/rrisd/Board.nsf/files/C5XQBB682131/$file/D2.COVID-19%20Protocols%20Aug.%2016%2C%202021.pdf) (last visited Sept. 16, 2021).

³ UPDATE ON MASK REQUIREMENT, ROUND ROCK INDEP. SCH. DIST. (Aug. 24, 2021), available at [https://go.boarddocs.com/tx/rrisd/Board.nsf/files/C67QTN6A5DA5/\\$file/D1.Mask%20Opt%20Out%20Aug.%2024%2C%202021.pdf](https://go.boarddocs.com/tx/rrisd/Board.nsf/files/C67QTN6A5DA5/$file/D1.Mask%20Opt%20Out%20Aug.%2024%2C%202021.pdf) (last visited Sept. 16, 2021) (App. 28–34).

Travis County litigation that affected all schools in the county. And the State did not file a separate suit against the District in either Travis or Williamson Counties.

Then, late on the night of Thursday, September 9th—nearly a month after the District’s mask requirement went into effect—the State filed an application for a temporary restraining order. Over the next four days, the State did not request a citation be issued to Round Rock ISD or make any known attempt to notify the District or its in-house Interim General Counsel of the TRO application. This despite the State’s attorneys having both actual knowledge of, and easy access to, the contact information for the District’s internal Interim General Counsel. On September 9 and September 15, 2021, another division of the Attorney General’s office copied the District’s Interim General Counsel on two requests for opinions regarding GA-38’s application to school masks mandates. App. 68–87. Besides this actual knowledge, a fifteen second Google search for “Round Rock ISD Legal” would have directed the State’s attorneys to the webpage for Round Rock ISD’s Legal Services

Department,⁴ from which one click on the “Staff” icon pulls up the Interim General Counsel’s phone number and email address.⁵

On September 14th, without conducting a hearing or receiving any oral argument, the trial court signed the State’s *ex parte* TRO. R. 38–40 (App. 1–3). The TRO is set to expire in two weeks, on September 28th, when the trial court will also hear arguments regarding a temporary injunction.

II. ARGUMENTS & AUTHORITIES

A. Round Rock ISD is entitled to mandamus relief.

Mandamus relief is available where the trial court’s error “constitute[s] a clear abuse of discretion” and the relator lacks “an adequate remedy by appeal.” *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Both elements are met here.

⁴ *Legal Services*, ROUND ROCK INDEP. SCH. DIST., available at <https://roundrockisd.org/legal-services/> (last visited Sep. 15, 2021).

⁵ *Legal Services Staff*, ROUND ROCK INDEP. SCH. DIST., available at <https://roundrockisd.org/legal-services/legal-services-staff/> (last accessed Sep. 15, 2021).

1. The Court abused its discretion by issuing an *ex parte* temporary restraining order that violates the Texas Rules of Civil Procedure and the Williamson County Local Rules.

“[A] clear failure by the trial court to . . . apply the law correctly will constitute an abuse of discretion.” *Walker*, 827 S.W.2d at 840. Texas Rule of Civil Procedure 680 states that “[n]o temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.” TEX. R. CIV. P. 680. Four days passed between the State’s request for, and the trial court’s granting of, the *ex parte* TRO. Given that the District’s Interim General Counsel’s contact information was known and easily knowable, there is no reason that the District could not have been notified before the TRO was granted. Moreover, the State cannot plausibly assert an “immediate” injury requiring *ex parte* relief when it waited nearly a month to challenge the allegedly injurious conduct.

In addition to the defects in the foundation of the *ex parte* TRO, the order itself is facially void for failing to comply with the Texas Rules of Civil Procedure. “Texas Rules of Civil Procedure 680 and 684 require a

trial court issuing a temporary restraining order to: (1) state why the order was granted without notice if it is granted *ex parte*; [and] (2) state the reasons for the issuance of the order by defining the injury and describing why it is irreparable” *In re Office of Att’y Gen.*, 257 S.W.3d 695, 697 (Tex. 2008) (citations omitted) (orig. proceeding). Texas Rule of Civil Procedure 683 further provides that “every restraining order shall set forth the reasons for its issuance [and] shall be specific in terms” TEX. R. CIV. P. 683. “Orders that fail to fulfill these requirements are void.” *See In re Office of Att’y Gen.*, 257 S.W.3d at 697; *In re Elevacity, LLC*, No. 05-18-00135-CV, 2018 WL 915031, at *2 (Tex. App.—Dallas Feb. 16, 2018, no pet.) (orig. proceeding).

The TRO at issue does not explain why it was granted without providing notice to Round Rock ISD. *See* R. 38–40. In fact, the TRO is completely silent on the issue—it does not even mention that the order was entered *ex parte*, much less provide fact-based reasoning for why it needed to be. *See id.* There is no indication in the TRO that the trial court even considered this requirement of Rule 680, and the court certainly did not comply with it. *See In re Office of Att’y Gen.*, 257 S.W.3d at 697; *In re Elevacity*, 2018 WL 915031, at *2.

Nor does the TRO describe why the purported injury to the State was irreparable, as required by the Rule. The order states: “The Court finds that . . . a temporary restraining order is required to preserve the status quo and to prevent the irreparable harm of the continued violation of state law absent injunctive relief.” R. 38–39.⁶ That statement defines the alleged injury, but the bare conclusion that the injury is irreparable falls obviously short of “describing” why it is so. *See In re Elevacity*, 2018 WL 915031, at *2 (conclusory statement that injury is irreparable is insufficient) (citing *El Tacaso, Inc. v. Kireh Star, Inc.*, 356 S.W.3d 740, 747 (Tex. App.—Dallas 2011, no pet.); *Autonation, Inc. v. Hatfield*, 186 S.W.3d 576, 581 (Tex. App.—Houston [14th District] 2005, no pet.)).

The trial court’s failure to provide the required justifications for its extraordinary action renders the order void on its face. *See In re Office of Att’y Gen.*, 257 S.W.3d at 697. Issuance of a temporary restraining order

⁶ A TRO may not be used to obtain an advance ruling on the merits: if the existence of the alleged irreparable harm depends on the resolution of the central legal dispute, injunctive relief should be deferred until at least the more stringent temporary-injunction stage, which considers the petitioner’s likelihood of success. *See In re Newton*, 146 S.W.3d 648, 651–52 (Tex. 2004) (orig. proceeding) (citing *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 769 (Tex. App.—Fort Worth 1994, writ dism’d w.o.j.)). Here, the alleged irreparable harm was resolution of the central legal dispute: the validity of GA-38’s prohibition on mask requirements in Texas public schools.

that violates the strictures of Rule 680 is an abuse of discretion supporting mandamus relief. *See id.*; *In re Tex. Nat. Res. Conservation Comm’n*, 85 S.W.3d 201, 205 (Tex. 2002) (orig. proceeding).

The TRO was also issued in violation of local court rules. Section 1.C.3 of the Williamson County Local Rules states: “Before presenting a TRO . . . the Attorney representing the Defendant or Respondent, if known, must be notified by the Plaintiff’s or Movant’s Attorney and given the opportunity to appear with Plaintiff’s or Movant’s Attorney.”⁷ As explained above, the State’s attorneys knew or should have known how to contact Round Rock ISD’s Interim General Counsel. The rule is thus clear: the District’s attorney “must” have been notified *before* the State presented its motion for a TRO and been given the opportunity to appear. Neither requirement was satisfied here, and the *ex parte* order offers no explanation for why it was entered in clear violation of the rules. Violation of local court rules is an abuse of discretion for which mandamus is appropriate. *See In re Mike Hooks, Inc.*, No. 01-12-00503-CV, 2012 WL 3629000, at *4 (Tex. App.—Houston [1st Dist.] Aug. 23,

⁷ WILLIAMSON COUNTY, LOCAL RULES (2012), available at <https://www.wilco.org/Portals/0/Departments/DistCourt425/finallocalRules2012.pdf?ver=2016-08-29-105341-570> (last accessed Sep. 15, 2021) (App. 18–27).

2012, no pet.) (orig. proceeding) (mem. op. by Bland, Huddle, and Radack, JJ.); *In re Houston Livestock Show & Rodeo*, No. 01-18-00825-CV, 2019 WL 2376120, at *5 (Tex. App.—Houston [1st Dist.] June 6, 2019, no pet.) (orig. proceeding) (mem. op.) (transfer of case in violation of local rules was abuse of discretion); *see also In re Siemens Corp.*, 153 S.W.3d 694, 698–99 (Tex. App.—Dallas 2005, no pet.) (orig. proceeding) (erroneous invalidation of local rule by district court was abuse of discretion supporting mandamus relief).⁸

⁸ Because the TRO is void on its face, Relators do not brief the substantive defects in the State’s application for a temporary restraining order or the Court’s TRO. Round Rock ISD reserves the right to address these arguments in full. Generally, Round Rock ISD asserts the State sought an alteration to the status quo, did not show a probable right to relief, and did not establish any threat of irreparable harm to the State. The balance of equities weighed in favor of the trial court denying injunctive relief and the requested injunctive relief disserves the public interest. GA-38’s prohibition on mask requirements invalidly erases school districts legislatively-conferred and long-established local control—the exclusive power and duty to govern and oversee the management of public schools, including to ensure the health and safety of school district students and staff. The Texas Disaster Act, TEX. GOV’T CODE §§ 418.001 *et seq.*, does not authorize the Governor to prohibit school districts from requiring masks. The Act places strict limits on the Governor’s ability to issue executive orders. TEX. GOV’T CODE § 418.012 (executive orders are limited to those made “[u]nder this chapter”). The Act does not authorize the Governor to suspend Sections 7.003 and 11.151 of the Education Code, and the suspension list does not suspend these provisions of the Education Code. TEX. GOV’T CODE § 418.016(a) (limiting suspension to “provisions of any regulatory statute prescribing the procedures for conduct of state business or the others or rules of a state agency” if the statute would hinder “coping with a disaster”); TEX. GOV’T CODE § 418.0155 (directive to compile suspension list). The Act does not authorize the Governor to preempt state laws—much less state law he cannot suspend, such as that reserving to local school boards the “exclusive power and duty” to oversee the management of public schools. TEX. EDUC. CODE § 11.151(b). The Governor’s power to control movement of people, TEX. GOV’T CODE § 418.018(c), does not allow him to prohibit mask requirements—

2. Round Rock ISD has no adequate remedy on appeal.

Because a temporary restraining order is not appealable, Round Rock ISD has no adequate remedy on appeal. *See In re Office of Att’y Gen.*, 257 S.W.3d at 698; *In re Cornyn*, 27 S.W.3d 327, 332–33, 335–37 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (orig. proceeding); *Rubin v. Hoffman*, 843 S.W.2d 658, 659 (Tex. App.—Dallas 1992, no pet.) (orig. proceeding). And even if Round Rock ISD could seek adequate remedy for the imposition of this void TRO on appeal, it would still be entitled to mandamus relief from a void judicial order. *See, e.g., In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428 (Tex. 1998) (orig. proceeding) (parties objecting to void judicial orders are entitled to mandamus relief without needing to show a lack of adequate remedy on appeal); *In re Cornyn*, 27 S.W.3d at 332 (courts will grant mandamus relief from void interlocutory orders even if they are appealable and adequate remedy could be had).

The *ex parte* TRO prohibits the District from requiring masks—the most effective non-pharmacological means of mitigating the spread of

what people must wear when within a building. The Governor is not the “commander in chief” of school districts; this power is limited to “state agencies, boards, and commissions having emergency responsibilities.” TEX. GOV’T CODE § 418.015(c). And school districts do not serve as agents of the Governor; schools are not “the governing body of any incorporated city or a county or the chief administrative officer of a joint board.” TEX. GOV’T CODE § 418.015(a)-(b).

COVID-19—on its campuses for a minimum of two weeks, at which point the Court has set a hearing for a temporary injunction. Even if the trial court denies a temporary injunction that day and restores the status quo, the District will have been bound for two weeks by a void but unappealable court order. During this time, Round Rock ISD faces increased risk of transmission of COVID-19 throughout its community and is unlawfully deprived of exercising its statutory right to local control over the district and to take reasonable measures to protect the health and safety of its students. *See Tex. Educ. Agency v. Hous. Indep. Sch. Dist.*, No. 03-20-00025, 2020 WL 7757365, at *9 (Tex. App.—Austin Dec. 30, 2020, pet. filed Feb. 24, 2021) (loss of local control over the governance of a school district is irreparable harm supporting temporary injunction). When the ordinary appellate process cannot afford timely relief, mandamus is proper. *See In re Woodfill*, 470 S.W.3d 473, 480–81 (Tex. 2015) (per curiam).

B. The TRO is an impermissible collateral attack on the School District Lawsuit in Travis County and that court’s jurisdiction, as well as this Court’s jurisdiction in the currently-pending appeal.

The TRO is an impermissible collateral attack on the School District Lawsuit in Travis County and this Court’s review of the

temporary injunction issued in that case. The School District Lawsuit in Travis County includes school district plaintiffs and intervenor school district plaintiffs, school districts responsible for educating more than one million Texas students including many students in Travis County. Parents of students in Travis County school districts also joined as intervenor plaintiffs. The School District Lawsuit in Travis County includes within the scope of its orders, including the temporary injunction, all school districts located within Travis County (which includes a portion of Round Rock ISD). The State is a party to the School District Lawsuit in Travis County and attorneys from the Office of the Attorney General participated in the temporary injunction hearing in that case. The State's appeal of the Travis County court's August 27, 2021 entry of a temporary injunction in the School District Lawsuit is currently pending in this Court under Cause No. 03-21-00428-CV.

The School District Lawsuit in Travis County squarely involves the question of whether Governor Abbott has the authority under the Texas Disaster Act to prevent school districts from adopting mask requirements. In the School District Lawsuit, the Court determined that school districts, as opposed to the Governor, are likely to prevail on the

issue of whether Governor Abbott can prohibit public school districts from requiring masks. App. 56–60. Having obtained an automatic stay and superseded the temporary injunction entered in the School District Lawsuit in Travis County, the State does not have the right to launch collateral attacks on the Travis County court’s or this Court’s jurisdiction over the State by suing Round Rock ISD—located in part in Travis County and therefore covered by the orders in the School District Lawsuit—in a different jurisdiction regarding the same exact issue already under consideration and appeal in the School District Lawsuit in Travis County. *See Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (“[U]nless a judgment of general jurisdiction is void, it is not subject to collateral attack in another court of equal jurisdiction.”); *London Market Insurers v. Am. Home Assur. Co.*, 95 S.W.3d 702, 706 (Tex. App.—Corpus Christi 2003, no pet.) (“Where jurisdiction is once lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat that jurisdiction.”) (internal citations and alterations omitted).

A collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the judgment, but in order to obtain some specific

relief which the judgment currently stands as a bar against.” *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005); *see also Devji v. Keller*, No. 03-02-00754-CV, 2003 WL 21705829, at *8 (Tex. App.—Austin July 24, 2003, no pet.) (“A collateral attack is ‘an attempt to avoid the effect of a judgment in a proceeding brought for some other purpose.’”) (*quoting Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, 870 (Tex. App.—Houston [14th Dist.] 2000, no pet.)). A collateral attack “seeks to avoid the prior judgment’s binding force in order to obtain specific relief against which the judgment stands as a bar.” *Fiallos v. Pagan-Lewis Motors, Inc.*, 147 S.W.3d 578, 586 (Tex. App.—Corpus Christi 2004, pet. denied). Because the temporary injunction order entered in the School District Lawsuit in Travis County is not void, it is not subject to collateral attack in a separate proceeding. *See, e.g., Morgan v. Williams*, 610 S.W.2d 467, 468 (Tex. 1981).

Because the School District Lawsuit in Travis County was filed—and the temporary injunction entered in that matter appealed—several weeks before the State’s suit against Round Rock ISD, the Travis County court and this Court, through the already pending appeal of the School District Lawsuit, have dominant jurisdiction over the dispute regarding

Governor Abbott’s ability to prohibit mask requirements in schools. *See In re J.B. Hunt Transport, Inc.*, 492 S.W.3d 287, 294 (Tex. 2016) (“The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts.”). By seeking the TRO in Williamson County, the State sought to avoid the Travis County court’s and this Court’s jurisdiction and the binding effect of the temporary injunction in the School District Lawsuit in Travis County and any judgment entered therein.

Moreover, the State’s pursuit of a temporary restraining order in a separate proceeding against Round Rock ISD—which is within the scope of the order in the School District Lawsuit in Travis County—is an intentional waiver of the automatic stay provided by section 51.014(b) of the Texas Civil Practice and Remedies Code, which calls into question whether the State is acting in violation of the temporary injunction in the School District Lawsuit they attempted to supersede through their appeal of that matter by seeking to enforce the portions of GA-38 related to face coverings against the very school district the Travis County court’s temporary injunction precludes them from so doing. The underlying proceeding in Williamson County is therefore an impermissible collateral

attack that threatens the Travis County court's and this Court's dominant jurisdiction over the claims at issue in the School District Lawsuit in Travis County. The TRO entered by the trial court should not be allowed to stand.

PRAYER FOR RELIEF

For all of the foregoing reasons, Relators ask the Court to grant the petition for a writ of mandamus and either vacate or reverse the district court's *ex parte* temporary restraining order.

Respectfully submitted,

/s/ Carlos G. Lopez

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COUNSEL FOR RELATORS

CERTIFICATION OF RECORD REFERENCES

In accordance with Tex. R. App. P. 52.3(j), I certify that I have reviewed the Petition and concluded that every factual statement in the Petition is supported by competent evidence included in the accompanying appendix or record.

/s/ Carlos G. Lopez

CARLOS G. LOPEZ

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing document conforms with the form requirements of Tex. R. App. P. 9.4 and contains 3,980 words, excluding those portions that do not count towards the total under that rule.

/s/ Carlos G. Lopez

CARLOS G. LOPEZ

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon all counsel of record and parties via the Court's electronic filing system on this 17th day of September, 2021.

The Honorable Rick J. Kennon
368th Judicial District Court
Williamson County Justice Center
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Georgetown, Texas 78626
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*Counsel for Real Party in Interest,
State of Texas*

/s/ Carlos G. Lopez
CARLOS G. LOPEZ

No. _____

**IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT OF TEXAS IN AUSTIN**

In re ROUND ROCK INDEPENDENT SCHOOL DISTRICT, BOARD OF TRUSTEES OF ROUND ROCK INDEPENDENT SCHOOL DISTRICT, DR. HAFEDH AZAIEZ, in his official capacity as superintendent of the Round Rock Independent School District, and AMY WEIR, AMBER FELLER, TIFFANIE HARRISON, DR. JUN XIAO, DR. MARY BONE, CORY VESSA, AND DANIELLE WESTON, in their official capacities as trustees of the Round Rock Independent School District,

Relators.

On Petition for Writ of Mandamus
to the 368th Judicial District Court, Williamson County

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

TAB	ORDER COMPLAINED OF	PAGE
1.	Order Granting State of Texas's Application for a Temporary Restraining Order (R. 38–40)	App. 1–3
	STATUTES AND RULES	
2.	Texas Government Code § 22.221	App. 4–5
3.	Texas Government Code § 418.012	App. 6
4.	Texas Government Code § 418.015	App. 7
5.	Texas Government Code § 418.0155	App. 8

6.	Texas Government Code § 418.016	App. 9–11
7.	Texas Government Code § 418.018	App. 12
8.	Texas Education Code § 11.151	App. 13–14
9.	Texas Rule of Civil Procedure 680	App. 15
10.	Texas Rule of Civil Procedure 683	App. 16
11.	Texas Rule of Appellate Procedure 52.1	App. 17
12.	Williamson County Local Rules § 1.C.3	App. 18–27
	OTHER PERTINENT ITEMS	
13.	Round Rock ISD Update on Mask Requirement, dated August 24, 2021	App. 28–34
14.	Order by the County Judge of Travis County, Texas, Relating to the COVID-19 and Mask to Be Safe at School, dated August 13, 2021	App. 35–40
15.	Order Granting Temporary Restraining Order in School District Litigation in Travis County, dated August 15, 2021	App. 41–44
16.	Resolution and Order of the Travis County Commissioners Court Mandating Continued Compliance with Local Health Authority Orders and Adopting Criteria for Declaring a Public Health Nuisance, dated August 24, 2021	App. 45–55
17.	Order Granting Temporary Injunction in School District Litigation in Travis County, dated August 27, 2021	App. 56–60
18.	Defendants’ Notice of Accelerated Interlocutory Appeal in School District	App. 61–67

	Litigation in Travis County, dated August 27, 2021	
19.	Letter from Office of the Attorney General of Texas to Round Rock ISD, dated September 9, 2021	App. 68–77
20.	Letter from Office of the Attorney General of Texas to Round Rock ISD, dated September 15, 2021	App. 78–87
21.	Email from Kimberly Gdula to Carlos G. Lopez, sent September 15, 2021 at 9:36 a.m.	App. 88–89
22.	Email from Kimberly Gdula to Carlos G. Lopez, sent September 15, 2021 at 9:50 a.m.	App. 90–91

JUDICIAL DISTRICT

R. 000038
App. 0001

prevent the irreparable harm of the continued violation of state law absent injunctive relief.

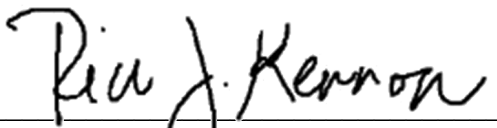
It is therefore ORDERED that the State of Texas's Application for a Temporary Restraining Order is GRANTED.

It is FURTHER ORDERED that Defendants are prohibited from enforcing a facemask mandate for as long as GA-38 (or a future executive order containing the same prohibitions) remain in effect.

It is FURTHER ORDERED that the State of Texas is exempt from the requirement to post bond.

It is FURTHER ORDERED a hearing on the State of Texas's application for temporary injunction is set for the 28 ^{September} day of _____ 2021 at 9 a.m.. The purpose of this hearing shall be to determine whether the Temporary Restraining Order should be made a temporary injunction pending a full trial on the merits.

Signed this 14 ^{September} day of _____, 2021 at 11:17 a.m.
9/14/2021 11:17:00 AM


JUDGE PRESIDING

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Bonnie Chester on behalf of Kimberly Gdula
Bar No. 24052209
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Status as of 9/10/2021 8:12 AM CST

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R. 000040

App. 0003

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter C. Courts of Appeals (Refs & Annos)

V.T.C.A., Government Code § 22.221

§ 22.221. Writ Power

Effective: September 1, 2017

[Currentness](#)

- (a) Each court of appeals or a justice of a court of appeals may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court.
- (b) Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against:
- (1) a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district;
 - (2) a judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district; or
 - (3) an associate judge of a district or county court appointed by a judge under Chapter 201, Family Code, in the court of appeals district for the judge who appointed the associate judge.
- (c) Repealed by [Acts 1987, 70th Leg., ch. 148, § 2.03, eff. Sept. 1, 1987](#).
- (d) Concurrently with the supreme court, the court of appeals of a court of appeals district in which a person is restrained in his liberty, or a justice of the court of appeals, may issue a writ of habeas corpus when it appears that the restraint of liberty is by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case. Pending the hearing of an application for a writ of habeas corpus, the court of appeals or a justice of the court of appeals may admit to bail a person to whom the writ of habeas corpus may be granted.

Credits

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by [Acts 1987, 70th Leg., ch. 69, § 1, eff. May 6, 1987](#); [Acts 1987, 70th Leg., ch. 148, §§ 1.35, 2.03, eff. Sept. 1, 1987](#); [Acts 1991, 72nd Leg., ch. 58, § 1, eff. May 2, 1991](#); [Acts 1995, 74th Leg., ch. 839, § 1, eff. Sept. 1, 1995](#); [Acts 2017, 85th Leg., ch. 740 \(S.B. 1233\), § 1, eff. Sept. 1, 2017](#); [Acts 2017, 85th Leg., ch. 1013 \(H.B. 1480\), § 1, eff. Sept. 1, 2017](#).

Editors' Notes

REVISOR'S NOTE

2004 Main Volume

The revised law in Subsection (b) omits “or any Justice thereof, in vacation,” from the source law in [V.A.C.S. Article 1824](#) because amendments to [V.A.C.S. Article 1816](#) have changed the original term of the courts of appeals from the first Monday in October until the first Monday in July to a term beginning and ending with each calendar year.

[Notes of Decisions \(402\)](#)

V. T. C. A., Government Code § 22.221, TX GOVT § 22.221

Current through the end of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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Vernon's Texas Statutes and Codes Annotated
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Title 4. Executive Branch (Refs & Annos)
Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.012

§ 418.012. Executive Orders

Currentness

Under this chapter, the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.

Notes of Decisions (6)

V. T. C. A., Government Code § 418.012, TX GOVT § 418.012

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Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.015

§ 418.015. Effect of Disaster Declaration

Currentness

(a) An executive order or proclamation declaring a state of disaster:

(1) activates the disaster recovery and rehabilitation aspects of the state emergency management plan applicable to the area subject to the declaration; and

(2) authorizes the deployment and use of any forces to which the plan applies and the use or distribution of any supplies, equipment, and materials or facilities assembled, stockpiled, or arranged to be made available under this chapter or other law relating to disasters.

(b) The preparedness and response aspects of the state emergency management plan are activated as provided by that plan.

(c) During a state of disaster and the following recovery period, the governor is the commander in chief of state agencies, boards, and commissions having emergency responsibilities. To the greatest extent possible, the governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or plans, but this chapter does not restrict the governor's authority to do so by orders issued at the time of the disaster.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.

V. T. C. A., Government Code § 418.015, TX GOVT § 418.015

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Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.0155

§ 418.0155. Suspension List

Effective: September 1, 2019

[Currentness](#)

(a) The governor's office, using existing resources, shall compile and maintain a comprehensive list of regulatory statutes and rules that may require suspension during a disaster.

(b) On request by the governor's office, a state agency that would be impacted by the suspension of a statute or rule on the list compiled under Subsection (a) shall review the list for accuracy and shall advise the governor's office regarding any statutes or rules that should be added to the list.

Credits

Added by [Acts 2019, 86th Leg., ch. 945 \(H.B. 7\), § 1, eff. Sept. 1, 2019](#).

V. T. C. A., Government Code § 418.0155, TX GOVT § 418.0155

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Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.016

§ 418.016. Suspension of Certain Laws and Rules

Effective: September 1, 2013

[Currentness](#)

(a) The governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.

(b) Upon declaration of a state of disaster, enforcement of the regulation of on-premise outdoor signs under Subchapter A, Chapter 216, Local Government Code,¹ by a municipality that is located in a county within, or that is located in a county adjacent to a county within, the disaster area specified by the declaration is suspended to allow licensed or admitted insurance carriers or licensed agents acting on behalf of insurance carriers to erect temporary claims service signage for not more than 30 days or until the end of the declaration of disaster, whichever is earlier.

(c) A temporary claims service sign shall not:

(1) be larger than forty square feet in size;

(2) be more than five feet in height; and

(3) be placed in the right of way.

(d) At the end of the 30 days or the end of the declaration of disaster, whichever is earlier, the insurance carrier or its licensed agents must remove the temporary claims service signage that was erected.

(e) On request of a political subdivision, the governor may waive or suspend a deadline imposed by a statute or the orders or rules of a state agency on the political subdivision, including a deadline relating to a budget or ad valorem tax, if the waiver or suspension is reasonably necessary to cope with a disaster.

(f) The governor may suspend any of the following requirements in response to an emergency or disaster declaration of another jurisdiction if strict compliance with the requirement would prevent, hinder, or delay necessary action in assisting another state with coping with an emergency or disaster:

(1) a registration requirement in an agreement entered into under the International Registration Plan under [Section 502.091, Transportation Code](#), to the extent authorized by federal law;

(2) a temporary registration permit requirement under [Section 502.094, Transportation Code](#);

(3) a provision of Subtitle E, Title 7, Transportation Code², to the extent authorized by federal law;

(4) a motor carrier registration requirement under Chapter 643, Transportation Code;

(5) a registration requirement under Chapter 645, Transportation Code, to the extent authorized by federal law; or

(6) a fuel tax requirement under the International Fuel Tax Agreement described by [49 U.S.C. Section 31701 et seq.](#), to the extent authorized by federal law.

(g) For the purposes of Subsection (f), “emergency or disaster declaration of another jurisdiction” means an emergency declaration, a major disaster declaration, a state of emergency declaration, a state of disaster declaration, or a similar declaration made by:

(1) the president of the United States under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ([42 U.S.C. Section 5121 et seq.](#)); or

(2) the governor of another state.

(h) To the extent federal law requires this state to issue a special permit under [23 U.S.C. Section 127](#) or an executive order, a suspension issued under Subsection (f) is a special permit or an executive order.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987. Amended by Acts 2009, 81st Leg., ch. 990, § 1, eff. June 19, 2009; Acts 2009, 81st Leg., ch. 1280, § 1.03a, eff. Sept. 1, 2009; Acts 2011, 82nd Leg., ch. 91 (S.B. 1303), § 11.008, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 1135 (H.B. 2741), § 3, eff. Sept. 1, 2013.

Notes of Decisions (4)

Footnotes

1 V.T.C.A., Local Government Code § 216.001 et seq.

2 V.T.C.A. Transportation Code § 621.001 et seq.

V. T. C. A., Government Code § 418.016, TX GOVT § 418.016

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Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.018

§ 418.018. Movement of People

[Currentness](#)

- (a) The governor may recommend the evacuation of all or part of the population from a stricken or threatened area in the state if the governor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.
- (b) The governor may prescribe routes, modes of transportation, and destinations in connection with an evacuation.
- (c) The governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area.

Credits

[Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.](#)

V. T. C. A., Government Code § 418.018, TX GOVT § 418.018

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Vernon's Texas Statutes and Codes Annotated
Education Code (Refs & Annos)
Title 2. Public Education (Refs & Annos)
Subtitle C. Local Organization and Governance
Chapter 11. School Districts (Refs & Annos)
Subchapter D. Powers and Duties of Board of Trustees of Independent School District

V.T.C.A., Education Code § 11.151

§ 11.151. In General

Effective: September 1, 2021

Currentness

- (a) The trustees of an independent school district constitute a body corporate and in the name of the district may acquire and hold real and personal property, sue and be sued, and receive bequests and donations or other moneys or funds coming legally into their hands.
- (b) Except as provided by [Sections 39A.201](#) and [39A.202](#), the trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. All powers and duties not specifically delegated by statute to the agency or to the State Board of Education are reserved for the trustees, and the agency may not substitute its judgment for the lawful exercise of those powers and duties by the trustees.
- (c) All rights and titles to the school property of the district, whether real or personal, shall be vested in the trustees and their successors in office. The trustees may, in any appropriate manner, dispose of property that is no longer necessary for the operation of the school district.
- (d) The trustees may adopt rules and bylaws necessary to carry out the powers and duties provided by Subsection (b).
- (e) A school district may request the assistance of the attorney general on any legal matter. The district must pay any costs associated with the assistance.
- (f) For purposes of this section, a county board of education, as defined by a board of county school trustees, and office of county school superintendent in a county with a population of 2.2 million or more and that is adjacent to a county with a population of more than 800,000 are included within the definition of a school district and subject to the oversight of the agency.

Credits

Added by [Acts 1995, 74th Leg., ch. 260, § 1, eff. May 30, 1995](#). Amended by [Acts 2003, 78th Leg., ch. 201, § 5, eff. Sept. 1, 2003](#); [Acts 2017, 85th Leg., ch. 925 \(S.B. 1566\), § 1, eff. Sept. 1, 2017](#); [Acts 2021, 87th Leg., ch. 1046 \(S.B. 1365\), § 1.02, eff. Sept. 1, 2021](#).

Notes of Decisions (203)

V. T. C. A., Education Code § 11.151, TX EDUC § 11.151

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Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part VI. Rules Relating to Ancillary Proceedings
Section 5. Injunctions

TX Rules of Civil Procedure, Rule 680

Rule 680. Temporary Restraining Order

Currentness

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after signing, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.

Credits

Dec. 5, 1983, eff. April 1, 1984. Amended by order of July 15, 1987, eff. Jan. 1, 1988.

Notes of Decisions (166)

Vernon's Ann. Texas Rules Civ. Proc., Rule 680, TX R RCP Rule 680
Current with amendments received through June 15, 2021

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part VI. Rules Relating to Ancillary Proceedings
Section 5. Injunctions

TX Rules of Civil Procedure, Rule 683

Rule 683. Form and Scope of Injunction or Restraining Order

[Currentness](#)

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.¹

Credits

Dec. 5, 1983, eff. April 1, 1984.

[Notes of Decisions \(517\)](#)

Footnotes

¹ See [V.T.C.A., Civil Practice and Remedies Code § 51.014\(b\)](#) added by Acts 1997, 75th Leg., ch. 1296, § 1, effective June 20, 1997.

Vernon's Ann. Texas Rules Civ. Proc., Rule 683, TX R RCP Rule 683

Current with amendments received through June 15, 2021

Vernon's Texas Rules Annotated
Texas Rules of Appellate Procedure
Section Three. Original Proceedings in the Supreme Court and the Courts of Appeals
Rule 52. Original Proceedings (Refs & Annos)

TX Rules App.Proc., Rule 52.1

52.1. Commencement

Effective: June 1, 2020

[Currentness](#)

An original appellate proceeding seeking extraordinary relief--such as a writ of habeas corpus, mandamus, prohibition, injunction, or quo warranto--is commenced by filing a petition with the clerk of the appropriate appellate court. The petition must be captioned "*In re* [name of relator]."

Credits

Eff. Sept. 1, 1997.

[Notes of Decisions \(81\)](#)

Rules App. Proc., Rule 52.1, TX R APP Rule 52.1

Current with amendments received through June 15, 2021

WILLIAMSON COUNTY LOCAL RULES 2012

Revised February 2012

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SECTION 1
GENERAL RULES APPLICABLE TO ALL DISTRICT COURTS
AND COUNTY COURTS AT LAW

A. DECORUM

1. Opening Procedure. Immediately before the scheduled time for the first court session on each day, the Bailiff shall direct all persons present to their seats and shall cause the courtroom to come to order. As the Judge (or Master) enters the courtroom the Bailiff shall state:

“Everyone rise, please”

And while everyone is still standing, the Bailiff shall announce:

“The _____ Court of Williamson County, Texas, is now in session. Judge _____ presiding. Be seated, please.”

2. Recess. When the Judge (or Master) announces a recess, the Bailiff shall state:

“Everyone rise, please”

And all shall remain standing until the Judge (or Master) enters and shall then state:

“Be seated, please.”

Before a recess of a jury trial, the Jury shall be excused and all other persons present shall rise while the Bailiff conducts the Jury from the courtroom into the jury room.

- 3 General Rules of Courtroom Conduct.

- a. All officers of the Court, and all other participants, except witnesses who have been placed under the Rule, shall promptly enter the courtroom before the scheduled time for each court session. When the Bailiff calls the Court to order, complete order should be observed.

- b. In the courtrooms, the following conduct is not permitted :

- 1). The use of tobacco;
- 2) Chewing gum;
- 3) Reading of newspapers or magazines;
- 4) Bottles, cups or beverage containers except court water pitchers and cups;

- 5) Food;
 - 6) Propping of feet on tables or chairs;
 - 7) Talking that interferes with court proceedings;
 - 8) Possession of knives or firearms;
 - 9) Use of any electronic device to record or photograph any court proceedings;
 - 10) Use of cell phones or any other electronic device, except by attorneys with permission of the court.
- c. The Judge, the Attorneys, and other officers of the Court will refer to and address other court officers and participants in the proceeding respectfully and impersonally by using appropriate titles and surnames rather than first names. The form of address toward a Judge shall be “Your Honor”. Any reference to the Judge shall be to “The Court”.
 - d. The oath will be administered in a manner calculated to impress upon the witnesses the importance and solemnity of the promise to adhere to the truth.
4. Conduct of Attorneys
- a. Attorneys should observe the letter of all canons of ethic, including those dealing with discussion of cases with representatives of the media and those concerning improper ex parte communications with the Judge;
 - b. Attorneys should advise their clients and witnesses of local Rules of Decorum that may be applicable;
 - c. All objections, arguments, and other comments by the counsel shall be directed to the Judge or Jury and not to opposing Counsel;
 - d. While another Attorney is addressing the Judge or Jury, an Attorney should not stand for any purpose except to claim the right to interrupt the Attorney who is speaking to make a proper objection;
 - e. Attorneys should not approach the bench without leave of the court; should leave the courtroom only upon being granted permission to leave,

and should never lean on the bench;

- f. Attorneys shall remain seated at the counsel tables at all times except;
 - (1) when the Judge or Jury enters and leaves;
 - (2) when addressing the Judge or Jury; and
 - (3) whenever it may be proper to handle documents, exhibits, or other evidence. (Leave of court is required.)
- g. Attorneys should anticipate any need to move furniture, easels or set-up electronic equipment and make advance arrangements with the Bailiff. Such moving or arrangements should not take place during court sessions, if at all possible.

5. Dress Code

- a. All officers of the Court shall dress appropriate for court sessions; appropriate dress entails attire suitable for formal professional or business engagements.
- b. Jurors, witnesses, parties and members of the public should dress appropriately, without displaying pictures or words that are derogatory, crude, offensive, profane or disrespectful to the court proceedings.

6 Conduct of Photographers and of Television and Broadcasting Personnel

The media must obtain prior permission of the Court, and if said permission is granted, the following rules apply:

- a. Television. One fixed video camera with one operator will be permitted in the courtroom during the trial. No camera lights will be permitted in the courtroom. The various television stations will have to agree to share the tape and agree upon whose camera will be located in the courtroom. There will be no other television or movie film permitted in the courtroom. No interviews of any kind will be permitted in the courtroom. No filming will be permitted through the windows in the courtroom door. No films, videos or photos shall be made of any juror involved in the case. No witnesses should be filmed or photographed unless advance written permission is obtained from the witness.

- b. Other Media. Radio, print and television media representatives will be permitted in the courtroom so long as there is adequate seating for public access to the courtroom. Still camera photographs without flash will be permitted in the courtroom so long as the operator takes pictures from his or her seat without changing locations in the courtroom or creating a disturbance or disruption. No interviews shall be held in the courtroom. So long as all media representatives honor the Court's rules concerning media in the courtroom, these rules will remain in effect. Any violation of these rules will result in the exclusion of all filming, photographing and interviewing inside the Justice Center for the duration of that trial.

B. UNCONTESTED DOCKET

Each Court will establish procedures for uncontested cases filed in that Court.

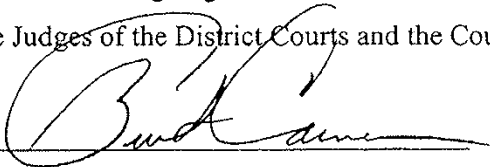
C. TRO'S, WRITS OF ATTACHMENT, WRITS OF GARNISHMENT, WRITS OF SEQUESTRATION

1. Presentation. Cases requesting extraordinary relief shall be presented by the Attorney to the Judge in whose court the case is pending. If that Judge is unavailable and if waiting for that Judge to become available would result in an emergency situation, then the matter may be presented to another Judge for consideration.
2. TRO's in Non-Family Civil Cases. County Court at Law Judges will not grant TRO's in non-family District Court cases.
3. Notice. Before presenting a TRO or any petition for extraordinary relief, the Attorney representing the Defendant or Respondent, if known, must be notified by the Plaintiff's or Movant's Attorney and given the opportunity to appear with Plaintiffs or Movant's Attorney.

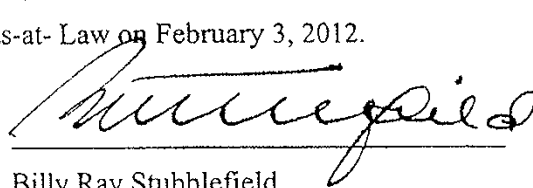
D. HEARINGS CONDUCTED BY PHONE

1. Agreement. At the discretion of the Judge and after arrangements have been made in advance for the Judge to be available, hearings not requiring the introduction of evidence may be conducted by telephone conference calls.
2. Arrangements. The Court Coordinator should not be requested to make

The foregoing Local Rules for Williamson County were approved at a called meeting of the Judges of the District Courts and the County Courts-at-Law on February 3, 2012.



Burt Carnes
Judge, 368th District Court
Williamson County, Texas



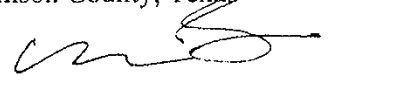
Billy Ray Stubblefield
Judge, 26th District Court
Williamson County, Texas



Ken Anderson
Judge, 277th District Court
Williamson County, Texas



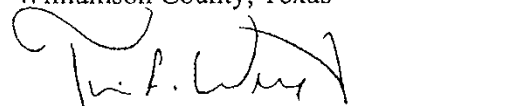
Michael Jergins
Judge, 395th District Court
Williamson County, Texas



Mark Silverstone
Judge, 425th District Court
Williamson County, Texas



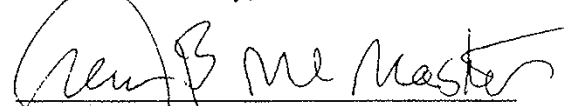
Suzanne Brooks
Judge, County Court at Law One
Williamson County, Texas



Tim Wright
Judge, County Court at Law Two
Williamson County, Texas



Doug Arnold
Judge, County Court at Law Three
Williamson County, Texas

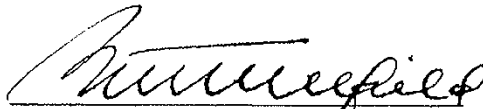


John B. McMaster
Judge, County Court at Law Four
Williamson County, Texas

CERTIFICATE OF APPROVAL
OF REGIONAL JUDGE

The Local Rules of Williamson County approved by the District Court Judges and the County Court-at-Law Judges of Williamson County, Texas on February 3, 2012 is hereby approved and transmitted to the Supreme Court of Texas for final action this 3rd day of

February, 2012



Billy Ray Stubblefield, Presiding Judge
Third Administrative Judicial Region

IN THE SUPREME COURT OF TEXAS

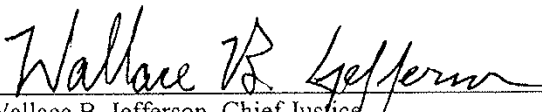
Misc. Docket No. 12- 9049

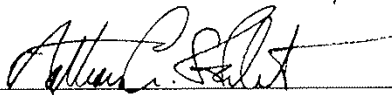
**APPROVAL OF LOCAL RULES FOR
THE DISTRICT AND COUNTY COURTS OF
WILLIAMSON COUNTY**

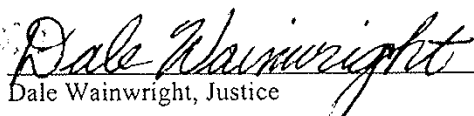
ORDERED that:

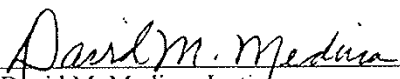
Pursuant to Texas Rule of Civil Procedure 3a, the Supreme Court approves the following local rules for the District and County Courts of Williamson County.

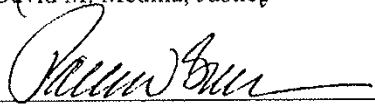
Dated: March ^{26th}, 2012.

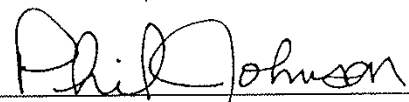

Wallace B. Jefferson, Chief Justice

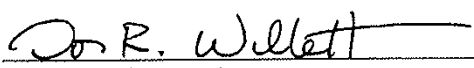

Nathan L. Hecht, Justice

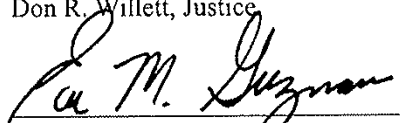

Dale Wainwright, Justice

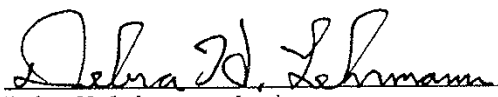

David M. Medina, Justice


Paul W. Green, Justice


Phil Johnson, Justice


Don R. Willett, Justice


Eva M. Guzman, Justice


Debra H. Lehrmann, Justice



Update on Mask Requirement

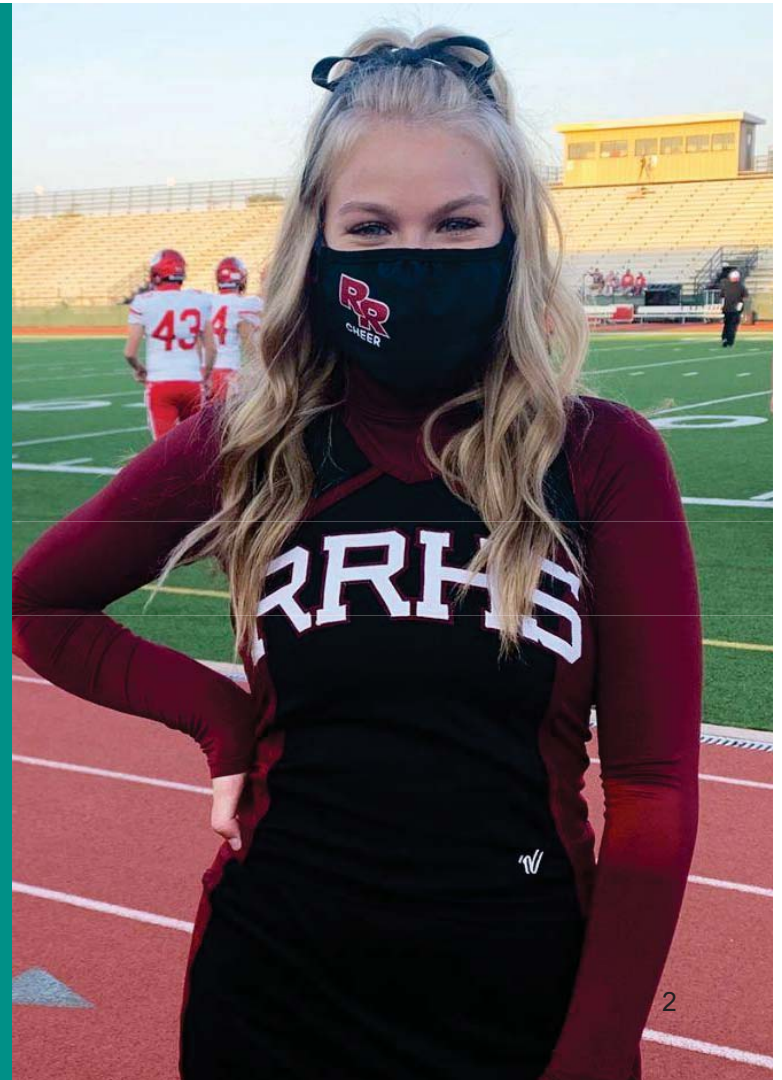
Called Board Meeting, August 24, 2021



ROUND ROCK
INDEPENDENT SCHOOL DISTRICT

Legal Updates

- Texas Supreme Court action on Thursday (Aug. 19) means that the Orders from Travis County/City of Austin stand.
- Any public school in those jurisdictions that does not require masks will be deemed a public health nuisance, and the City or County may file a lawsuit against the school to force compliance. Pursuant to the prior orders, civil or criminal penalties could also apply.
- The Texas Education Agency is no longer enforcing the Governor's ban on masks in public schools due to legal challenges, leaving the decision to local school districts.



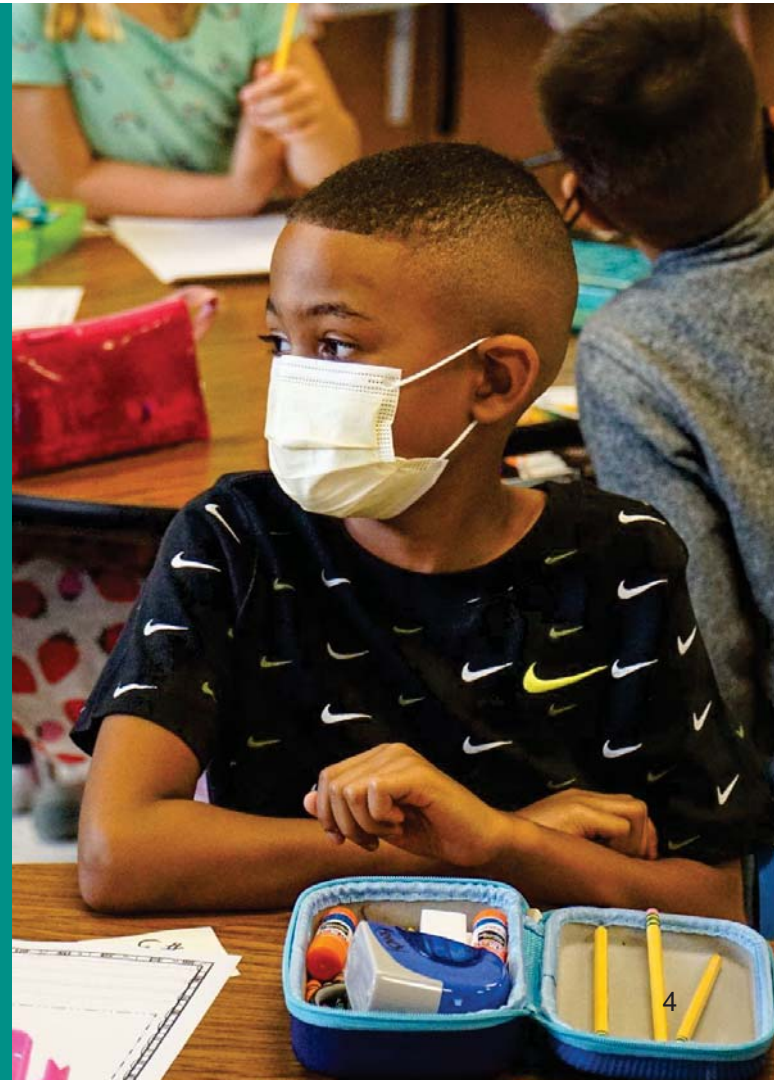
Health Authority Guidance

- Dr. Desmar Walkes, City of Austin Health Authority/Austin Public Health Medical Director: *"Masks address the surge, and vaccinations will end the pandemic. To get out of this, we need to do both as a community."*
- Dr. Amanda Norwood, [WCCHD](#) Medical Director: *"Our recommendation supports universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status. We know from the success schools had last year in keeping cases very low, there is an opportunity for students to return in person safely by following these tried and true personal protection measures."*



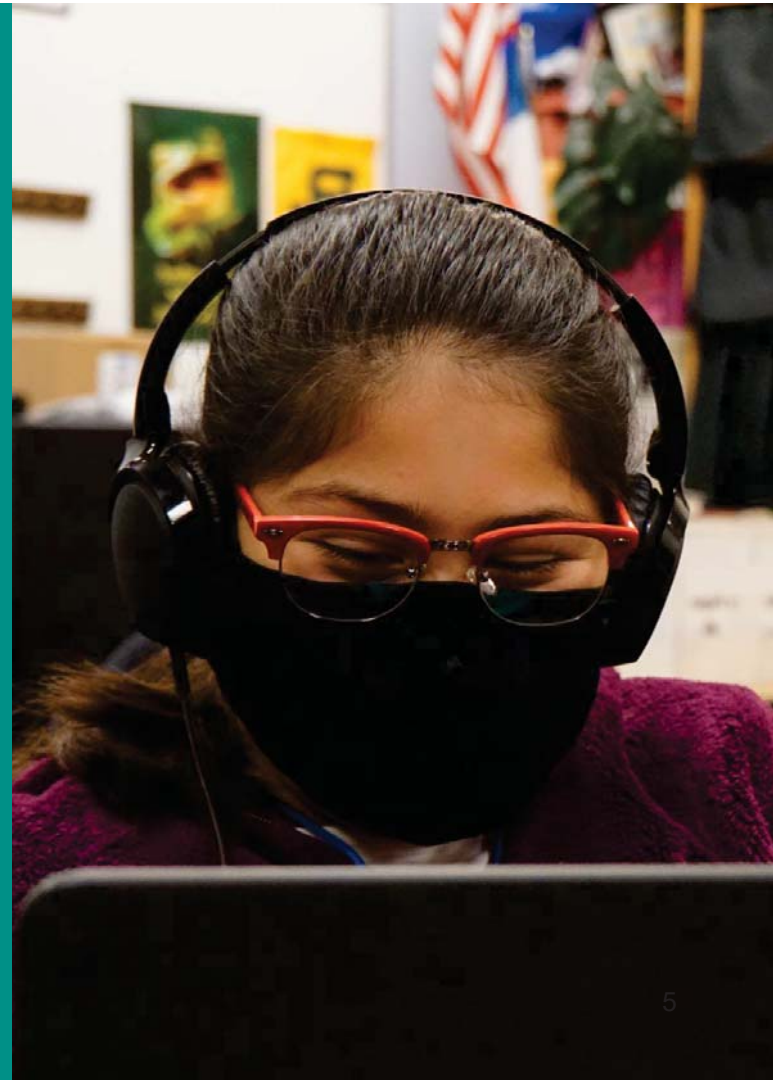
District Priorities

- Health and Safety of Students and Staff
 - First three days of school, 78 reported cases and 433 close contacts
- Keep our schools open and students learning with face-to-face instruction
- Do our part to reverse the trend of community spread so we can return to normal operations.



Recommendation

- The temporary mask requirement will be enforced uniformly for all students, staff and visitors.
- Parents of students with an opt out form on file will need to resubmit and provide a health or developmental condition. (Will provide a one-week transition period to provide documentation.)
- Staff will be required to wear a mask unless they have a health issue that prevents them from doing so.
- Masks will be available at campuses.



Mask Requirement

- Requirement is temporary and ends September 17, 2021 unless extend by the Board of Trustees.
- Masks are only required indoors and when maintaining 6-feet of distance is not possible.
- Masks are not required while seated in the cafeteria or staff lunch rooms.
- Masks may be removed for activities during athletics, fine arts, and physical education classes if deemed appropriate by the coach, director or instructor.



A photograph of two individuals in a classroom-like environment, both wearing VR headsets. The person in the foreground is seated, wearing a blue t-shirt with a yellow floral pattern and a white face mask, holding the VR headset with both hands. The person in the background is also seated, wearing a blue t-shirt and holding a VR headset. The entire image is overlaid with a semi-transparent teal color. The word "Questions?" is written in white, bold, sans-serif font across the center of the image.

Questions?

**ORDER BY THE COUNTY JUDGE OF TRAVIS COUNTY****STAYS IN FILE****County Judge Amended Order 2021-08a; Relating to the COVID-19 and Mask to be Safe at School**

Whereas, on March 6, 2020, a Declaration of Local Disaster was issued by the Travis County Judge to allow the County of Travis ("County" or "Travis County"), Texas, to take measures to reduce the possibility of exposure to COVID-19 and promote the health and safety of Travis County residents; and

Whereas, on March 13, 2020, a Declaration of State of Disaster was issued by Governor Greg Abbott to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of Texans; and

Whereas, the virus that causes COVID-19 is contagious and spreads through person-to-person contact, especially in group settings; and

Whereas, COVID-19 continues to menace the health of County residents and with the presence of the Delta variant, a highly transmissible and more contagious variation of COVID-19, Dr. Desmar Walkes, the Austin-Travis County Health Authority has implored individuals to wear face coverings to prevent further transmission of COVID-19; and

Whereas, cases and hospitalizations continue to increase in Travis County as new variants spread throughout the community and public health officials recommend that individuals take additional precautions such as wearing a face covering even if vaccinated, as set forth in the COVID-19 Risk-Based Charts for vaccinated and unvaccinated/partially vaccinated individuals attached as **Exhibit A**; and

Whereas, the COVID-19 virus has mutated and developed more highly contagious strains, such as the Delta variant, that has led to increased pediatric hospital admissions throughout the Austin-Travis County area, as children younger than 12 years are not eligible to receive the COVID-19 vaccine, and requiring face coverings in schools is a necessary measure to prevent transmission of COVID-19 among the unvaccinated; and

Whereas, reliable medical information indicates that even individuals who have received a COVID-19 vaccine are capable of contracting and spreading the current Delta variant of the virus; and

Whereas, schools are starting their school year in upcoming weeks; and

Whereas, the County Judge has determined that extraordinary emergency measures must be taken to try and mitigate the effects of this public health emergency and to facilitate a response to the public health threat in order to protect the health and safety of the community; and

Whereas, pursuant to Government Code section 418.108(g), a County Judge is authorized to control ingress and egress from a local disaster area, and control the movement of persons and the occupancy of premises in that disaster area; and

Whereas, the purpose of this Amended Order is to update the definition of schools referenced in County Judge Order No. 2021-08 issued on August 11, 2021 and replaces Order No. 2021-08; and

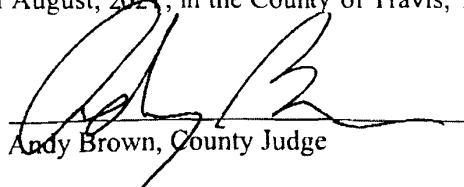
Whereas, this Order is necessary to protect the public health and welfare of the community and those individuals who attend, visit or work in Travis County schools and help control further transmission of COVID-19.

NOW THEREFORE, I, COUNTY JUDGE OF TRAVIS COUNTY, PURSUANT TO THE AUTHORITY VESTED BY TEXAS GOVERNMENT CODE CHAPTER 418, HEREBY FIND AND ORDER THAT:

Effective as of 9:00 a.m. on August 13, 2021, and continuing until modified or terminated by the Travis County Judge or as otherwise indicated below:

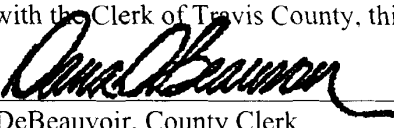
1. **Face Coverings Required.** Students, staff, and visitors over the age of two (2) are REQUIRED to wear a face covering while on school property or school buses during Stages 3, 4, and 5 as set forth in Austin Public Health's Risk-Based Chart attached as **Exhibit A**. A face covering is a form of covering that fits snugly over their nose and mouth, such as a commercially made or homemade fabric mask, scarf, bandana.
2. This Order shall apply to all public schools, including charter schools and public colleges in Travis County.
3. A principal, the responsible staff or administrator of the students, may determine when it is not appropriate to require students, staff, and visitors to wear a face covering.
4. Compliance with this Order is reliant on self-regulation and a community commitment to public health and safety under the threat of COVID-19.
5. The Travis County Clerk and Austin Public Health Department will post this Order on their websites.
6. **Savings Clause.** If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.
7. This Order is issued in accordance with and incorporates by reference all declarations, findings, and recitations set out in the preamble to this Order and incorporates by reference the following:
 - a. **Exhibit A:** Stage 5 Risk Based Guidelines for Vaccinated and Unvaccinated Individuals.

ORDERED this the 13 day of August, 2021, in the County of Travis, Texas.


Andy Brown, County Judge































Andy Brown, County Judge
County of Travis, Texas

Filed with the Clerk of Travis County, this 13th day of August, 2021.


Dana DeBeauvoir, County Clerk

COVID-19 Risk-Based Chart — Vaccinated

* Please continue following additional requirements of local businesses, venues and schools regardless of vaccination status or stage.
Schools, hospitals, and long term living centers follow CDC and APH guidelines—or—the regulatory agency's policy.

	Private Gatherings* With People Outside Your Household				Travel*		Dining*		Shopping*	
	Indoor		Outdoor		Low-Risk	High-Risk	Low-Risk	High-Risk	Low-Risk	High-Risk
	Low-Risk	High-Risk	Low-Risk	High-Risk						
Stage 1										
Stage 2										
Stage 3							 			
Stage 4										
Stage 5	 		 		 Only if essential		 Indoors +   Outdoors		 Outdoors/ Takeaway/ Curbside	



Mask optional, continue washing hands and other hygiene precautions



Not recommended at all, with or without masks



Take prevention measures: wear a mask, wash your hands and social distance following CDC guidelines























Places that require vaccines and masks may pose a lower risk.



COVID-19 Risk-Based Chart — Partly Vaccinated or Unvaccinated

* Please continue following additional requirements of local businesses, venues and schools regardless of vaccination status or stage.
Schools, hospitals, and long term living centers follow CDC and APH guidelines—or—the regulatory agency's policy.

	Private Gatherings* With People Outside Your Household		Travel*	Dining*	Shopping*
	Indoor	Outdoor			
Stage 1					
Stage 2					
Stage 3	 If high risk: avoid unless essential	 If high risk: avoid unless essential	 If high risk: avoid unless essential	 If high risk: avoid unless essential	 If high risk: avoid unless essential
Stage 4			Only if essential	Takeaway/ Curbside	Only if essential
Stage 5				Takeaway/ Curbside	Takeaway/ Curbside



Mask optional, continue washing hands
and other hygiene precautions



Not recommended at all, with or
without masks



Take prevention measures:
wear a mask, wash your hands and
social distance following CDC guidelines





2021180216

**FILED AND RECORDED
OFFICIAL PUBLIC RECORDS**

Dana DeBeauvoir

Dana DeBeauvoir, County Clerk
Travis County, Texas

Aug 13, 2021 08:40 AM

Fee: \$0.00

MACEDOS

CAUSE NO. D-1-GN-21-003897

LA JOYA INDEPENDENT SCHOOL	§	IN THE DISTRICT COURT
DISTRICT, <i>et al.</i> ,	§	
Plaintiffs,	§	
	§	
SHANETRA MILES-FOWLER, ELIAS	§	
PONVERT, and KIM TAYLOR,	§	
Intervenor-Plaintiffs,	§	353 rd JUDICIAL DISTRICT
	§	
v.	§	
	§	
GREG ABBOTT, in his official capacity	§	
as Governor of Texas,	§	
Defendant.	§	TRAVIS COUNTY, TEXAS

ORDER GRANTING TEMPORARY RESTRAINING ORDER
AND REQUEST FOR JUDICIAL NOTICE

On Friday, August 13, 2021, Intervenor Shanetra Miles-Fowler, Elias Ponvert, and Kim Taylor appeared, through their counsel, in this matter, and joined in the claims and demands for injunctive relief of Plaintiffs La Joya ISD, *et al.* Having heard the arguments of counsel and reviewed the pleadings and the legal arguments presented, the Court finds that Intervenor's request for a temporary restraining order has merit and should be GRANTED and finds the following:

Intervenor appeared through counsel and announced ready for a hearing on their request for a Temporary Restraining Order. Defendants appeared through counsel and announced ready.

Intervenor's Petition in Intervention states a claim upon which relief may be granted against Defendant.

Intervenor will probably prevail on the merits because Executive Order GA-38 exceeds the Governor's authority under the Texas Disaster Act and relies on a statutory delegation of

authority that violates the Texas Constitution. The Court finds that Intervenor's have a viable *ultra vires* claim against Defendant.

Intervenor's have made a threshold showing that the enforcement of Executive Order GA-38 against school districts would result in an immediate and irreparable injury to Intervenor's and would leave them without an adequate remedy at law. Intervenor's have shown an irreparable injury by showing likely success on the merits. Additionally, the Court finds that if not immediately restrained as to school districts, the enforcement of the Governor's Executive Order GA-38 will foreseeably result in irreparable injury to Intervenor's because it will prevent school districts from taking reasonable health and safety measures that will allow them to protect the health and safety of their students and staff and provide a quality education to their students.

The Court finds that Defendant has not presented any evidence to show that the granting of the requested temporary restraining order would result in a credible threat of imminent harm to Defendants.

The Court finds that security to be posed by Intervenor's in the amount of \$200 will be sufficient pursuant to Texas Rule of Civil Procedure 684.

The Court takes judicial notice and accepts into evidence, the August 10, 2021, presentation of Dr. Desmar Walkes, Travis County Health Authority and Austin Public Health Medical Director, including the slides attached to Intervenor's' Petition as Exhibit 1.

IT IS THEREFORE ORDERED that Defendant Greg Abbott, in his official capacity as Governor of Texas, and his officers, agents, servants, employees, and attorneys are temporarily restrained and enjoined from enforcing the portions of Executive Order GA 38 regarding face coverings against any public school located within Travis County until this Court holds a hearing

on Intervenor's request for a temporary injunction, and has issued a decision on the Intervenor's request for temporary injunction, or until the temporary restraining order hereby issued has expired as a matter of law. The temporary injunction hearing is set for 9:00 a.m. on August 23, 2021 on the Central Docket in the Travis County Civil District Courts. Pursuant to the existing Emergency Orders resulting from the COVID-19 pandemic, this hearing will take place remotely, using Zoom videoconferencing.

IT IS FURTHER ORDERED that the Temporary Restraining Order granted by this Court shall become effective immediately upon the deposit by Intervenor in the amount of \$200, with the Clerk of this Court, and that upon such deposit by Intervenor, the Clerk of this Court is ordered to immediately issue the writ of Temporary Restraining Order to Defendant.

Signed on August 15, 2021 at 5:00 P.M., in Travis County, Texas.


Jan Soifer, Judge Presiding

AGREED AS TO FORM AND SUBSTANCE:

By: /s/ Michael Siegel
Michael Siegel, Esq.
mike@register2vote.org
State Bar No. 24093148
4107 Medical Parkway, #212
Austin, TX 78756
Tel: (737) 615-9044
Counsel for Intervenors

AGREED AS TO FORM ONLY:

By: /s/ Benjamin L. Dower
BENJAMIN L. DOWER
Assistant Attorney General
Texas State Bar No. 24082931
benjamin.dower@oag.texas.gov
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 / Fax (512) 320-0667
Counsel for Defendant Governor Abbott



**RESOLUTION AND ORDER OF THE TRAVIS COUNTY COMMISSIONERS COURT
MANDATING CONTINUED COMPLIANCE WITH LOCAL HEALTH AUTHORITY
ORDERS AND ADOPTING CRITERIA FOR DECLARING A PUBLIC HEALTH
NUISANCE**

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

RECITALS AND FINDINGS

1. On March 6, 2020, a Declaration of Local Disaster was issued by the Travis County Judge to allow the County of Travis, Texas ("County" or "Travis County") to take measures to reduce the possibility of exposure to COVID-19 and promote the health and safety of Travis County residents; and
2. On March 13, 2020, a Declaration of State of Disaster was issued by Governor Greg Abbott to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of Texans; and
3. The virus that causes COVID-19 is contagious and spreads through person-to-person contact, especially in group settings; and
4. COVID-19 continues to menace the health of County residents and with the presence of the Delta variant, a highly transmissible and more contagious variation of COVID-19, Dr. Desmar Walkes, the Austin-Travis County Health Authority has implored individuals to wear face coverings to prevent further transmission of COVID-19; and
5. Cases and hospitalizations continue to increase in Travis County as new variants spread throughout the community and public health officials recommend that individuals take additional precautions such as wearing a face covering even if vaccinated, as set forth in the COVID-19 Risk-Based Charts for vaccinated and unvaccinated/partially vaccinated individuals attached as Exhibit 1 to the Health Authority Rules; and
6. The COVID-19 virus has mutated and developed more highly contagious strains, such as the Delta variant, that has led to increased pediatric hospital admissions throughout the Austin-Travis County area, as children younger than 12 years are not eligible to receive the COVID-19 vaccine, and requiring face coverings in schools is a necessary measure to prevent transmission of COVID-19 among the unvaccinated; and
7. Reliable medical information indicates that even individuals who have received a COVID-19 vaccine are capable of contracting and spreading the current Delta variant of the virus; and
8. The transmission of COVID-19 remains a significant threat to the health and safety of the Travis County community as indicated by the County's Local Health Authority; and

9. Based on a finding of imminent peril to the public health and safety, Dr. Desmar Walkes, Health Authority for Austin/Travis County (the "Local Health Authority") and through an Interlocal Cooperation Agreement for Public Health Services executed by City and County, issued notices adopting emergency rules for the City of Austin on August 11, 16 and 20, 2021 as well as emergency rules for Travis County on August 16 and August 23, 2021 and continuing through December 10, 2021, to require individuals over the age of two to wear a face covering while on school property or school buses during Stages 3, 4, and 5 as set forth in Austin Public Health's Risk-Based Chart, for the purpose of reducing the possibility of exposure to COVID-19 and protecting the public health; and
10. Previously, on March 9, 2021, April 12, 2021 and on August 17, 2021, the Travis County Commissioners Court approved Resolutions and Orders mandating compliance with the Health Authority Rules and Order issued by the Health Authority and adopted criteria for declaring a public health nuisance and authorizing enforcement for the unincorporated areas of the County, consistent with the City of Austin; and
11. The County has the authority to provide for the care of indigents and other qualified recipients (Texas Local Government Code, Section 81.027, and other statutes, including Tex. Gov't Code, Section 418.054) and the County has the authority to provide for public health education and information services (Texas Health and Safety Code, Chapters 81, 121 and 122, and other statutes); and
12. The County and the City of Austin ("City") are authorized to cooperate with one another in making necessary improvements and providing services to promote the public health (Texas Health and Safety Code, Section 121.003 and Tex. Gov't Code, Chapters 418 and 791); and
13. The Local Health Authority has supervisory authority and control over the administration of communicable disease control measures within their jurisdiction, unless specifically preempted by the state, and is authorized to perform each duty that is necessary to implement and enforce a law necessary to protect the public health (Texas Health and Safety Code, sections 81.082, 81.084, 81.086 and 121.024); and
14. Section 121.003 of the Texas Health and Safety Code authorizes the Commissioners Court of the County to enforce any law that is reasonably necessary to protect the public health; and
15. The Travis County Commissioners Court finds that extraordinary emergency measures must be taken to mitigate the effects of this public health emergency and facilitate a response to the public health threat, and pursuant to section 121.003 of the Texas Health and Safety Code, that this Order of the Commissioners Court adopting compliance with the Local Health Authority's emergency rules is necessary to protect the public health; and
16. Section 341.011 of the Texas Health and Safety Code defines a "public health nuisance" to include an object, place, or condition that is a possible and probable medium of disease transmission in or between humans; and
17. These measures include abating a public health nuisance as allowed by Texas Health and Safety Code, Section 341.012.

NOW, THEREFORE, BE IT RESOLVED AND ORDERED BY THE COMMISSIONERS COURT OF TRAVIS COUNTY, TEXAS, THAT:

SECTION 1. EFFECTIVE DATE AND INCORPORATION. The Recitals and Findings set out above are true and correct, and are adopted by the Commissioners Court and incorporated into this Order for all purposes. This Order takes effect immediately upon approval by the Travis County Commissioners Court.

SECTION 2. DEFINITIONS

A. In this Order, the following definitions shall apply:

1. **COVID-19** means the pandemic that is the subject of the Local Disaster Declaration, dated March 6, 2020.
2. **FACE COVERING** means a covering that fits snugly over an individual's nose and mouth, such as a commercially made or homemade fabric mask, scarf, bandana, handkerchief, or shield.
3. **AUSTIN PUBLIC HEALTH'S RISK-BASED CHART** means the chart attached as Exhibit 1 to the Health Authority Emergency Rules.
4. **SCHOOL** means all public schools, including public charter schools and public colleges, in Travis County.
5. **LOCAL HEALTH AUTHORITY ORDER** means any rule issued by the Local Health Authority in accordance with this order.

SECTION 3. EMERGENCY HEALTH AUTHORITY RULES AND ORDER FOR PROTECTION OF PUBLIC HEALTH

A. To protect the health of individuals within the County, the Local Health Authority may adopt local rules in the form of Local Health Authority Orders reasonably necessary to protect the health of persons within the County, including mitigating and reducing the transmission of COVID-19.

B. Local Health Authority Order must be executed by the Local Health Authority.

C. The Local Health Authority for Travis County issued Emergency Rules and Orders for public schools, including public charter schools and public colleges, in Travis County **on August 23, 2021, and effective through December 10, 2021**. A copy of the Emergency Rules and Order for Travis County is attached as **Exhibit A**.

SECTION 4. DECLARATION OF NUISANCE. By this Order and pursuant to its authority under the aforementioned provisions of the Texas Health and Safety Code, the Commissioners Court declares a School that does not follow the Minimum Standards established in this Order as

a public health nuisance because it is a place or condition that is a possible and probable medium of COVID-19 transmission in or between humans.

SECTION 5. PUBLIC HEALTH NUISANCE. A School that does not comply with Minimum Health Standards described in this Order maintains a public health nuisance that is subject to abatement.

SECTION 6. Community Expectations:

- A. An individual who is not fully vaccinated will continue to wear face coverings, keep at least three feet of physical distance from other individuals, and avoid crowds and poorly ventilated spaces.
- B. An individual who is fully vaccinated will continue to wear face coverings and, to the extent feasible, keep at least three feet of physical distance from other individuals when the risk of transmission to those who are not fully vaccinated is significant.
- C. A person in control of a site is encouraged to support and provide incentives for workers and patrons to obtain the vaccine to reduce the risk to those who are unable to receive the vaccine, including children under the age of 12.
- D. Nothing in these rules prevents a person in control of a site from requiring additional precautions to prevent the spread of COVID-19.

SECTION 7. MINIMUM STANDARDS.

Face Covering Applicable to School.

- A. Students, staff, and visitors over the age of two are required to wear a face covering while on school property or school buses during Stages 3, 4, and 5 as set forth in Austin Public Health's Risk-Based Chart.
- B. A principal, the responsible staff member, or administrator of the students may determine when it is not appropriate to require students, staff, and visitors to wear a face covering.

SECTION 8. ENFORCEMENT. This Order may be enforced as follows:

- A. Through a civil suit filed in district court for injunctive relief that:
 - (1) requires specific conduct necessary to abate the public health nuisance; and
 - (2) prohibits specific conduct that constitutes a public health nuisance.
- B. The Commissioners Court authorizes the County Attorney to file civil suits seeking the relief described in Subsection (A).

SECTION 9. NON-EXCLUSIVITY. The enforcement mechanisms provided for herein are not

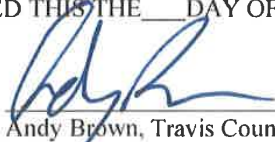
intended, nor shall they be construed, to limit in any way other remedies, causes of action, or rights provided for by law. Additionally, the adoption of this Order does not restrict, limit, or replace any other County authority for abating public nuisances.

SECTION 10. SAVINGS CLAUSE. If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.

SECTION 11. This Order incorporates by reference the following:

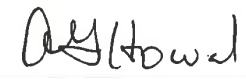
Exhibit A: Health Authority Rules and Order dated August 23, 2021

ADOPTED AND APPROVED THIS THE DAY OF August, 2021.


Andy Brown, Travis County Judge


Jeffrey W. Travillion
Commissioner, Precinct One


Brigid Shea
Commissioner, Precinct Two


Ann Howard
Commissioner, Precinct Three


Margaret J. Gómez
Commissioner, Precinct Four

NOTICE OF EMERGENCY RULES ADOPTION AND ORDER

BY: Desmar Walkes, M.D., Health Authority.

ADOPTION DATE:

The Health Authority has adopted the following Emergency Rules and Order pursuant to Chapters 121 and 81 of the Texas Health and Safety Code.

EFFECTIVE DATE OF EMERGENCY RULES

The Emergency Rules and Order adopted by this notice are **effective on August 23, 2021** and **expire on December 10, 2021** unless the rules are withdrawn or amended.

SUMMARY OF RULES

The Emergency Rules govern all public schools, including public charter schools and public colleges, in Travis County; and impose requirements reasonably necessary to protect public health related to the transmission of COVID-19.

TEXT OF THE RULES

See Exhibit A attached to this Notice of Emergency Rules Adoption.

NATURE OF EMERGENCY

The Health Authority find that an imminent peril to the public health, safety, or welfare requires adoption of the rules on an emergency basis. Specifically, emergency rules are required to reduce the possibility of exposure to COVID-19 and protect public health.

AUTHORITY FOR ADOPTION OF PROPOSED RULES AND ORDER

The authority and procedure for the implementation and adoption of a rule necessary to protect the public is provided in the Texas Health and Safety Code, chapters 81 and 121, including section 121.024 (b), 81.082, 81.084 and 81.086.

REVIEWED AND APPROVED



Date: August 23, 2021

Desmar Walkes, MD

Health Authority City of Austin/Travis

County

NOTICE OF EMERGENCY
RULES ADOPTION

HEALTH AUTHORITY
RULES AND ORDER

EXHIBIT A,

August 23, 2021



August 23, 2021

1. Expectations and Definitions.

1.1. Community Expectations

- 1.1.1. An individual who is not fully vaccinated will continue to wear face coverings, keep at least three feet of physical distance from other individuals, and avoid crowds and poorly ventilated spaces.
- 1.1.2. An individual who is fully vaccinated will continue to wear face coverings and, to the extent feasible, keep at least three feet of physical distance from other individuals when the risk of transmission to those who are not fully vaccinated is significant.
- 1.1.3. A person in control of a site is encouraged to support and provide incentives for workers and patrons to obtain the vaccine to reduce the risk to those who are unable to receive the vaccine, including children under the age of 12.
- 1.1.4. Nothing in these rules prevents a person in control of a site from requiring additional precautions to prevent the spread of COVID-19.

1.2. Definitions.

- A. AUSTIN PUBLIC HEALTH'S RISK-BASED CHART means the chart attached as Exhibit 1 to this rule.
- B. FACE COVERING means a form of covering that fits snugly over their nose and mouth, such as a commercially made or homemade fabric mask, scarf, bandana.
- C. SCHOOL means all public schools, including public charter schools and public colleges, in Travis County

2. Face Covering Applicable to School.

- 2.1. Students, staff, and visitors over the age of two are required to wear a face covering while on school property or school buses during Stages 3, 4, and 5 as set forth in Austin Public Health's Risk-Based Chart.
- 2.2. A principal, the responsible staff member, or administrator of the students may determine when it is not appropriate to require students, staff, and visitors to wear a face covering.

COVID-19 Risk-Based Chart — Vaccinated

• Exhibit 1 – Risk Based Charts

* Please continue following additional requirements of local businesses, venues and schools regardless of vaccination status or stage. Schools, hospitals, and long term living centers follow CDC and APH guidelines—or—the regulatory agency's policy.

	Private Gatherings* With People Outside Your Household				Travel*		Dining*		Shopping*	
	Indoor		Outdoor		Low-Risk	High-Risk	Low-Risk	High-Risk	Low-Risk	High-Risk
	Low-Risk	High-Risk	Low-Risk	High-Risk						
Stage 1										
Stage 2										
Stage 3										
Stage 4										
Stage 5										



Mask optional, continue washing hands and other hygiene precautions



Not recommended at all, with or without masks



Take prevention measures: wear a mask, wash your hands and social distance following CDC guidelines















Places that require vaccines and masks may pose a lower risk.

Delta Edition

COVID-19 Risk-Based Chart — Partly Vaccinated or Unvaccinated

* Please continue following additional requirements of local businesses, venues and schools regardless of vaccination status or stage. Schools, hospitals, and long term living centers follow CDC and APH guidelines—or—the regulatory agency's policy.

	Private Gatherings*		Travel*	Dining*	Shopping*
	Indoor	Outdoor			
Stage 1					
Stage 2					
Stage 3	 If high risk: avoid unless essential	 If high risk: avoid unless essential	 If high risk: avoid unless essential	 If high risk: avoid unless essential	 If high risk: avoid unless essential
Stage 4			Only if essential	Takeaway/ Curbside	Only if essential
Stage 5				Takeaway/ Curbside	Takeaway/ Curbside



Mask optional, continue washing hands and other hygiene precautions



Not recommended at all, with or without masks



Take prevention measures:
wear a mask, wash your hands and social distance following CDC guidelines

STAYS IN FILE



2021189328

**FILED AND RECORDED
OFFICIAL PUBLIC RECORDS**

Dana DeBeauvoir

**Dana DeBeauvoir, County Clerk
Travis County, Texas**

Aug 24, 2021 05:31 PM

Fee: \$0.00

HERRERAR

CAUSE NO. D-1-GN-21-003897

**La Joya ISD, Edinburg CISD, Hidalgo ISD,
Brownsville ISD, Crowley ISD, Edcouch-Elsa ISD,
Lasara ISD, Pharr-San Juan-Alamo ISD,
DeSoto ISD, Lancaster ISD, Ben Bolt-Palito
Blanco ISD, Fort Worth ISD, and El Paso ISD,
Plaintiffs**

Shanetra Miles-Fowler, Elias Ponvert, and Kim Taylor,
Intervenor-Plaintiffs

**Austin Community College District,
Intervenor-Plaintiffs**

**Houston ISD, Dallas ISD, Northside ISD,
Austin ISD, Aldine ISD, Spring ISD ,
Intervenor-Plaintiffs**

V.

**Greg Abbott, in his official capacity as Governor of
Texas,
Defendant**

**State of Texas, Office of the Texas Governor,
Office of the Attorney General, Ken Paxton, in his
Official Capacity as the Attorney General of Texas
Intervenor-Defendants**

IN THE DISTRICT COURT

353RD JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

ORDER GRANTING TEMPORARY INJUNCTION

Having heard the applications of Plaintiffs La Joya ISD, Edinburg CISD, Hidalgo ISD, Brownsville ISD, Crowley ISD, Edcouch-Elsa ISD, Lasara ISD, Pharr-San Juan-Alamo ISD, DeSoto ISD, Lancaster ISD, Ben Bolt-Palito Blanco ISD, Fort Worth ISD, and El Paso ISD and Intervenor-Plaintiffs Shanetra Miles-Fowler, Elias Ponvert, Kim Taylor, Austin Community College District, Houston ISD, Dallas ISD, Northside ISD, Austin ISD, Aldine ISD, and Spring ISD for a temporary injunction prohibiting Governor Abbott and his officers, agents, servants, employees, and attorneys from enforcing the portions of GA-38 related to face coverings against Plaintiffs, Intervenor-Plaintiffs, and any school district located within Travis County until further order of this Court or until this Court issues a final judgment in the above-styled and numbered action, whichever event occurs first, the Court finds the applications have merit and should be granted.

1. Plaintiffs and Intervenor-Plaintiffs appeared through counsel and announced ready for a hearing on their applications for temporary injunction. Defendant Greg Abbott appeared through counsel and announced ready on the Plaintiffs' and Intervenor-Plaintiffs' applications for temporary injunction.

2. The Court considered the admitted exhibits and witness testimony presented by the parties at this hearing, along with all written and oral arguments submitted by the parties and counsel. The Court is of the opinion that the Plaintiffs and Intervenor-Plaintiffs have met their burden to show their probable right of recovery on their claims against Governor Abbott, in his official capacity, asserting that Defendant's conduct and/or threatened conduct is without legal authority, is *ultra vires*, and violates the Texas Constitution. Plaintiffs and Intervenor-Plaintiffs have shown a probable right to relief on the merits of their claims.

3. The Court finds that Plaintiffs and Intervenor-Plaintiffs have made a sufficient showing of a probable right to recovery on their contention that under a proper construction of the applicable provisions of the Texas Constitution, the Texas Disaster Act, and the Texas Education Code that Defendant Governor Abbott, in his official capacity is not authorized to declare by executive fiat that school districts are prohibited from requiring individuals to wear face coverings.

4. The Court finds that Plaintiff has made a sufficient showing that the above-discussed conduct is unlawful, *ultra vires* conduct that violates the Texas Constitution and would cause irreparable harm to Plaintiffs, Intervenor-Plaintiffs, and the students, staff, and communities of Plaintiffs and Intervenor-Plaintiffs.

5. The Court finds that Plaintiffs and Intervenor-Plaintiffs will have no adequate remedy at law unless Defendant Greg Abbott is temporarily enjoined from enforcing the portion of GA-38 that prohibits school districts from requiring individuals to wear face coverings pending further order of this court or final trial on the merits of this suit, whichever event should first occur.

6. The Court finds that the issuance of a temporary injunction will maintain the status quo between the parties during the pendency of such order. The Court finds that during the 2020–2021 school year Texas school districts were permitted to require individuals to wear face coverings.

7. The Court finds that the balance of potential, irreparable harm to Plaintiffs and Intervenor-Plaintiffs and their students, staff, and local communities that would be caused by a denial of the requested temporary injunction, outweighs the potential harm, if any, to Defendant and that the public interest is served by granting this temporary injunction. Absent this order, the school districts and community college district will be unable to adopt a face covering requirement to control the spread of the COVID-19 virus, which threatens to overwhelm public schools and

could result in more extreme measures such as the school closures that have already begun in several Texas school districts.

8. The Court finds that Plaintiffs and Intervenor-Plaintiffs seek only declaratory and prospective injunctive relief against Defendant based on the allegations that Defendant's actions and proposed actions are without legal authority and are *ultra vires* and violate the Texas Constitution.

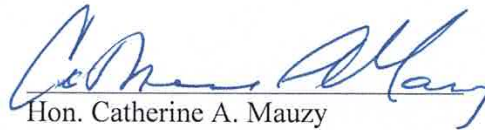
9. The Court finds that the amounts previously deposited with the Travis County District Clerk, constitute sufficient security, in lieu of bond, for any foreseeable harm or compensable damages that could result from the granting of this Temporary Injunction until further order of this Court or final judgment on the merits. This Temporary Injunction shall become effective immediately.

10. **IT IS THEREFORE ORDERED** that Defendant Greg Abbott, in his official capacity and his agents, servants, representatives, employees, designees, and officials acting in concert with him or on his behalf, are prohibited from enforcing the portions of GA-38 related to face coverings against Plaintiffs, Intervenor-Plaintiffs, and any school district located within Travis County until further order of this Court or until this Court issues a final judgment in the above-styled and numbered action, whichever event occurs first.

11. **IT IS FURTHER ORDERED** that trial on the merits of this case is set for January 18, 2023, at 9:00 o'clock a.m. in Travis County, Texas.

12. **IT IS FURTHER ORDERED** that the clerk of this Court shall forthwith, issue this Order Granting Temporary Injunction and Writ of Temporary Injunction in conformity with the law and the terms of this Order.

Signed and Entered on this the 27th day of August, 2021 at 3:15 P.M., in
Travis County, Texas.

A handwritten signature in blue ink, appearing to read "Catherine A. Mauzy", written over a horizontal line.

Hon. Catherine A. Mauzy
District Judge Presiding



03-21-00428-CV

TRIAL COURT CASE NO. D-1-GN-21-003897

§
§
§
§
§

IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
JUDICIAL DISTRICT

DISTRICT CLERK’S INFORMATION SHEET

THE FOLLOWING INFORMATION HAS BEEN COMPILED BY THE DISTRICT CLERKS OFFICE:

Date of order appealed: AUGUST 27, 2021

Type of Order (Interlocutory or Final) INTERLOCUTORY

Date Motion for New Trial Filed: _____

Request for Findings of Fact and Conclusions of Law filed: _____

Date Notice of Appeal Filed: AUGUST 27, 2021

Name of judge who entered judgment: CATHERINE A. MAUZY

Name of court reporter: LEAH HAYES

Address of court reporter: 1000 GUADALUPE, 5TH FLOOR, AUSTIN, TX 78701

Name of attorney on appeal: KIMBERLY GDULA SB#: 24052209

Attorney Address: PO BOX 12548, CAPITOL STATION, AUSTIN, TX 78711-2548

Attorney E-Mail Address: kimberly.gdula@oag.texas.gov

Attorney on appeal (check applicable box):

☐ appointed ☒ retained ☐ Pro Se

Name of Appellee’s Attorney: DAVID J. CAMPBELL SB# 4057033

Attorney Address: 808 WEST AVENUE, AUSTIN, TX 78701-2208

Attorney E-Mail Address: dcampbell11@8west.com

Send Information Sheet, Notice of Appeal and Motion for New Trial (if filed) to:

Third Court of Appeals (E-Mail Copy in PDF format to: 3rdClerksAndReporters@txcourts.gov)

Court Reporter: _____ E-Mail _____ Hand Delivery _____ Mail _____

On _____

By: _____ (clerk’s initials)

CAUSE No. D-1-GN-21-003897

LA JOYA INDEPENDENT SCHOOL §
DISTRICT, *et al.*, §
Plaintiffs, §

IN THE DISTRICT COURT

SHANETRA MILES-FOWLER, ELIAS §
PONVERT, and KIM TAYLOR §
Intervenor-Plaintiffs, §

AUSTIN COMMUNITY COLLEGE §
DISTRICT, §
Intervenor-Plaintiff, §

HOUSTON INDEPENDENT SCHOOL §
DISTRICT, DALLAS INDEPENDENT §
SCHOOL DISTRICT, NORTHSIDE §
INDEPENDENT SCHOOL DISTRICT, §
AUSTIN INDEPENDENT SCHOOL §
DISTRICT, ALDINE INDEPENDENT §
SCHOOL DISTRICT, SPRING §
INDEPENDENT SCHOOL DISTRICT, §
Intervenor School District §
Plaintiffs, §

353rd JUDICIAL DISTRICT

v. §
GREG ABBOTT, in his Official Capacity §
as Governor of Texas, §
Defendant, §

and §
STATE OF TEXAS, OFFICE OF THE §
TEXAS GOVERNOR, OFFICE OF THE §
ATTORNEY GENERAL; KEN PAXTON, §
in his Official Capacity as the Attorney §
General of Texas §
Intervenor Defendants. §

TRAVIS COUNTY, TEXAS

DEFENDANTS' NOTICE OF ACCELERATED INTERLOCUTORY APPEAL

Defendant Greg Abbott respectfully appeals the Court's interlocutory order of August 27, 2021, granting Plaintiffs' and Intervenor's request for a temporary injunction,

which only applies to him. Defendants Greg Abbott, Ken Paxton, and the State of Texas respectfully appeal the Court's interlocutory order of August 27, 2021, denying their plea to the jurisdiction. The Temporary Injunction Order enjoins enforcement of Executive Order GA-38 pending final judgment in this action.

Defendants are entitled to an interlocutory appeal pursuant to Civil Practice and Remedies Code section 51.014(a)(4) and (8), which allow for an immediate appeal from an order that grants a temporary injunction or that denies a plea to the jurisdiction. Defendants appeal to the Third Court of Appeals. This is an accelerated appeal as provided by Texas Rule of Appellate Procedure 28.1. This is not a parental termination or child protection case, as defined in Rule 28.4.

Pursuant to Texas Civil Practice and Remedies Code § 51.014(b), all further proceedings in this court are stayed pending resolution of Defendants' appeal. Upon filing of this instrument, the August 27, 2021 Temporary Injunction Order is superseded pursuant to Texas Civil Practice and Remedies Code section 6.001(b) and Texas Rule of Appellate Procedure 29.1(b). Pursuant to section 6.001, as the State and governmental officers, Defendants are not required to file a supersedeas bond for court costs. Defendants' appeal is therefore perfected upon the filing of the notice of appeal.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN COWLES
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief – General Litigation Division

/s/ Kimberly Gdula
KIMBERLY GDULA
Texas Bar No. 24052209
TODD DICKERSON
Texas Bar No. 24118368
BENJAMIN L. DOWER
Texas Bar No. 24082931
Assistant Attorney General
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548
(512) 475-4071
(512) 320-0667 FAX
Kimberly.Gdula@oag.texas.gov
Todd.Dickerson@oag.texas.gov
Benjamin.Dower@oag.texas.gov

COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served electronically on all parties of record through the electronic-filing manager in compliance with Texas Rule of Civil Procedure 21a on this August 27, 2021. I further certify that the foregoing instrument has been served on the court reporter for this court in compliance with Texas Civil Practice and Remedies Code § 51.017(a) at the email address listed below:

Lea Ohrstrom
lohrstrom@808west.com

/s/ Kimberly Gdula
Kimberly Gdula
Assistant Attorney General

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Tamera Martinez on behalf of Kimberly Gdula
Bar No. 24052209
Tamera.martinez@oag.texas.gov
Envelope ID: 56746948
Status as of 8/30/2021 12:25 PM CST

Associated Case Party: Austin Independent School District

Name	BarNumber	Email	TimestampSubmitted	Status
Holly McIntush		hmcintush@thompsonhorton.com	8/27/2021 4:32:50 PM	SENT
Carlos G.Lopez		clopez@thompsonhorton.com	8/27/2021 4:32:50 PM	SENT
Kathryn E. Long		klong@thompsonhorton.com	8/27/2021 4:32:50 PM	SENT
David Thompson		dthompson@thompsonhorton.com	8/27/2021 4:32:50 PM	SENT
Oleg Nudelman		onudelman@thompsonhorton.com	8/27/2021 4:32:50 PM	SENT
Adam Rothey		Arothey@thompsonhorton.com	8/27/2021 4:32:50 PM	SENT
Stefani Simpson		Ssimpson@thompsonhorton.com	8/27/2021 4:32:50 PM	SENT
Kristy Alonzo		kalonzo@thompsonhorton.com	8/27/2021 4:32:50 PM	SENT

Associated Case Party: Greg Abbott, In his Official Capacity as Governor of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Kimberly Gdula	24052209	kimberly.gdula@oag.texas.gov	8/27/2021 4:32:50 PM	SENT
Judd Stone	24076720	judd.e.stone@gmail.com	8/27/2021 4:32:50 PM	SENT
Christopher Hilton	24087727	christopher.hilton@oag.texas.gov	8/27/2021 4:32:50 PM	SENT
LASHANDA GREEN		lashanda.green@oag.texas.gov	8/27/2021 4:32:50 PM	SENT
Benjamin Dower		Benjamin.Dower@oag.texas.gov	8/27/2021 4:32:50 PM	SENT
Todd Dickerson		todd.dickerson@oag.texas.gov	8/27/2021 4:32:50 PM	SENT
Thomas Ray		thomas.ray@oag.texas.gov	8/27/2021 4:32:50 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Tamera Martinez		tamera.martinez@oag.texas.gov	8/27/2021 4:32:50 PM	SENT

Associated Case Party: La Joya Independent School District

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Tamera Martinez on behalf of Kimberly Gdula
Bar No. 24052209
Tamera.martinez@oag.texas.gov
Envelope ID: 56746948
Status as of 8/30/2021 12:25 PM CST

Associated Case Party: La Joya Independent School District

Name	BarNumber	Email	TimestampSubmitted	Status
Kevin O'Hanlon		kohanlon@808west.com	8/27/2021 4:32:50 PM	SENT
David Campbell		dcampbell@808west.com	8/27/2021 4:32:50 PM	SENT
Shareesa Alexander		salexander@808west.com	8/27/2021 4:32:50 PM	SENT
Ben Castillo		bcastillo@808west.com	8/27/2021 4:32:50 PM	SENT
Audra GonzalezWelter		awelter@808west.com	8/27/2021 4:32:50 PM	SENT
Lea Ohrstrom		lohrstrom@808west.com	8/27/2021 4:32:50 PM	SENT

Associated Case Party: Brownsville Independent School District

Name	BarNumber	Email	TimestampSubmitted	Status
David Campbell		dcampbell@808west.com	8/27/2021 4:32:50 PM	SENT

Associated Case Party: Kim Taylor

Name	BarNumber	Email	TimestampSubmitted	Status
Michael Siegel		mike@register2vote.org	8/27/2021 4:32:50 PM	SENT

Associated Case Party: Austin Community College District

Name	BarNumber	Email	TimestampSubmitted	Status
Gunnar Seaquist		gseaquist@bickerstaff.com	8/27/2021 4:32:50 PM	SENT
Cobby Caputo		ccaputo@bickerstaff.com	8/27/2021 4:32:50 PM	SENT
Joshua Katz		jkatz@bickerstaff.com	8/27/2021 4:32:50 PM	SENT



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 9, 2021

The Honorable Dee Hobbs
Williamson County Attorney
405 M.L.K. Street, #7
Georgetown, Texas 78626

Via E-Mail

Re: Whether Executive Order GA-38 creates a right, privilege, power, or immunity with regard to Texans' ability to not wear a face covering (RQ-0429-KP)

Dear Mr. Hobbs:

We received your request for an attorney general opinion and have designated it as Request No. 0429-KP. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received, unless before that deadline the Attorney General notifies the requesting person in writing that the opinion will be delayed. TEX. GOV'T CODE § 402.042(c)(2). We received your request on September 2, 2021, setting a due date for your opinion of March 1, 2022. However, we note that you have requested an expedited opinion. We will therefore make every effort to respond to your request as promptly as possible.

By copy of this letter, we are notifying those listed below of your request and inviting them to submit briefing on your question if they have a special interest or expertise in the subject matter. The Office of the Attorney General accepts briefing from any interested party. If you are aware of other individuals or entities with an interest in this issue, please forward this invitation for briefing to them or let us know, so that we may notify them as soon as possible. Briefs may be submitted by e-mail to opinion.committee@oag.texas.gov. Please note that briefs and other correspondence are subject to the Public Information Act.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Virginia K. Hoelscher
Chair, Opinion Committee

VKH/som

Attachment: Request No. 0429-KP

cc: The Honorable Greg Abbott, Governor of Texas
Mr. Luis Saenz, Chief of Staff, Office of the Governor
Mr. Jeff Oldham, General Counsel, Office of the Governor
Dr. Hafeedh Azaiez, Superintendent of Schools, Round Rock Independent School District
Ms. Jenny Wells, Interim General Counsel, Round Rock Independent School District
Ms. Susan M. Redford, Executive Director, Texas Association of Counties
Mr. Michael Pichinson, General Counsel, Texas Association of Counties
Ms. Joy Baskin, Director of Legal Services, Texas Association of School Boards
Mr. Robert Kepple, Executive Director, Texas District and County Attorneys Association
Ms. Diane Burch Beckham, Staff Senior Counsel, Texas District and County Attorneys Association
Mr. Bennett Sandlin, Executive Director, Texas Municipal League

RECEIVED

By Opinion Committee at 3:59 pm, Sep 02, 2021

First Assistant

Corby Holcomb

Criminal Division Chief

Laura Gorman

Civil Division Chief

Ariane Flores

Director Juvenile Division

Michael Cox

Director Family Justice

Elizabeth Watkins

(Board Certified Child Welfare Law)

DEE HOBBS

COUNTY ATTORNEY

405 M.L.K. Street #7
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General Counsel - Jason Nassour



Office Administrator

Stephanie Lloyd

Chief of Staff

Peggy Vasquez

Chief Investigator

Rudy Gonzalez

Evidence Director

Michael Etheridge

Victim Services Director

Sara Bill

Phone (512) 943-1111 • www.wilco.org/countyattorney • Fax (512) 943-1120

September 2, 2021

Via Electronic Mail

(opinion.committee@oag.texas.gov)

The Honorable Ken Paxton

Attorney General of the State of Texas

Attention: Opinion Committee

P.O. Box 12548

Austin, Texas 78711-2548

RQ-0429-KP

FILE# ML-49013-21

I.D.# 49013

Re: Request for an opinion regarding whether individuals have a right, privilege, power, or immunity created by Governor Abbott's *Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster* which states that no person may be required to wear or mandated to wear a face covering

Attorney General Paxton:

The Williamson County Attorney's Office respectfully requests your opinion on the following issue:

Question:

The Court of Criminal Appeals has assumed but not decided that "the phrase 'rights, privileges, powers, and immunities' [in Penal Code section 39.03] is so broad that it covers anything of value to a person." *Sanchez v. State*, 995 S.W.2d 677, 686 (Tex. Crim. App. 1999). Does an executive order which recognizes the ability of Texans to preserve their livelihoods and not be required to wear a face covering grant an individual a right, power, privilege or immunity?

Background:

In Governor Abbott's *Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster* (herein referred to as "Executive Order No. GA-38"), the Governor ordered that "no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering" so "[t]o ensure the ability of Texans to preserve livelihoods while protecting lives." Tex. Exec. Order No. GA-38 (July 29, 2021), https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_

COVID19_disaster_IMAGE_ 07-29-2021.pdf. The order further denies any “governmental entity, including a county, city, school district, and public health authority” or “governmental official” the power to “require any person to wear a face covering or to mandate that another person wear a face covering.” Tex. Exec. Order No. GA-38. Several governmental entities in Williamson County have imposed requirements that individuals wear face coverings. See Exhibit A (Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions,” issued Aug. 25, 2021); Exhibit B (“Superintendent: Mask Requirement for all Schools, Effective Aug. 18,” issued Aug. 17, 2021).

Texas Government Code section 418.014(a) provides that “[t]he governor by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent.” Tex. Gov’t Code §418.014(a). Executive orders, proclamations, and regulations or their amendments issued under Chapter 418 of the Government Code “have the force and effect of law.” Tex. Gov’t Code §418.012; see *Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020) (“The Texas Legislature has given Governor Abbott the authority to issue executive orders in times of emergencies, and those order have the force of a law.”).

Under Texas Penal Code section 39.03(a)(2), “[a] public servant acting under color of his office or employment commits an offense if he [...] intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.” Tex. Penal Code §39.03(a)(2). While “public servant,” “under color of his office or employment,” “intentionally” and “unlawfully” are statutorily defined, “right, privilege, power, or immunity” are not. See Tex. Penal Code §1.07(a)(41), (48); Tex. Penal Code §6.03(a); Tex. Penal Code §39.03(b).

Government Code section 311.011 provides that statutorily undefined words and phrases shall be “construed according to the rules of grammar and common usage.” Tex. Gov’t Code §311.011(a).

Government Code section 311.011 provides that statutorily undefined words and phrases shall be “construed according to the rules of grammar and common usage.” Tex. Gov’t Code §311.011(a). The common meaning of “right” is “something to which one has a just claim; such as the power or privilege to which one is justly entitled” or “something that one may properly claim as due.” *Merriam-Webster*, “Right” (<https://www.merriam-webster.com/dictionary/right>); see *Right*, Black’s Law Dictionary (11th ed. 2019) (defining “right” as “[s]omething that is due to a person by just claim, legal guarantee, or moral principal;” “[a] power, privilege, or immunity secured to a person by law;” “[a] legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is wrong”). “Privilege” means “a right or immunity granted as a peculiar benefit, advantage, or favor.” *Merriam-Webster*, “Privilege” (<https://www.merriam-webster.com/dictionary/privilege>); *Privilege*, Black’s Law Dictionary (11th ed. 2019) (defining “privilege” as “[a] special legal right, exemption, or immunity granted to a person or class or class of persons; an exception to a duty. A privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that, under ordinary circumstances, would subject the actor to liability.”). “Power” commonly means “legal or official authority, capacity, or right” among other meanings. *Merriam-Webster*, “Power” (<https://www.merriam-webster.com/dictionary/power>); *Power*, Black’s Law Dictionary (11th ed. 2019) (defining “power” as “the ability to act or not act; esp., a person’s capacity for acting in such a manner as to control someone else’s responses;” “[d]ominance, control, or influence over another; control over one’s subordinates;” “[t]he legal right or authorization to act or not act; a person’s or organization’s ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another.” “Immunity” means “[a]ny exemption from a duty, liability, or service of process; esp., such an exemption granted to a public official or governmental unit;” “[f]reedom of a person against having a given legal relations altered by someone else’s act or omission.” *Immunity*, Black’s Law Dictionary (11th ed. 2019).

The Court of Criminal Appeals, when addressing the construction of section 39.03 for a constitutional vagueness challenge, assumed but did not decide that “the phrase ‘rights, privileges, powers, and immunities’ is so broad that it covers anything of value to a person.” *Sanchez v. State*, 995 S.W.2d 677, 686 (Tex. Crim. App. 1999). Community complaints and reports received by the Williamson County Attorney’s Office demonstrate that individuals in Williamson County value the requirement that no person will be mandated or required to wear a face covering and that prohibition against governmental face covering mandates.

Does Executive Order No. GA-38 create a right, power, privilege, or immunity for individuals to be free from a requirement or mandate to wear a face covering?

As time is of the essence in determining the enforcement of Executive Order No. GA-38, I ask that your office expedite our request.

If you have any questions concerning this request, please feel free to contact me. Thank you for your review and consideration of this opinion request.

Respectfully submitted,

A handwritten signature in black ink that reads "Dee Hobbs". The signature is written in a cursive, flowing style.

Dee Hobbs
Williamson County Attorney

Enc.

Exhibit A—Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions”

Exhibit B—“Superintendent: Mask Requirement for all Schools, Effective Aug. 18”

Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions

Aug 25, 2021

Update: [Mask exemption forms](#) were updated on Aug. 26 in order to comply with medical privacy concerns. For exemptions, parents, guardians and staff must complete their [respective forms](#). Once completed, parents and guardians will submit a PDF copy of their documentation or provide appropriate documentation through the [Mask Exemption Document Form](#). Staff will turn in their completed form and/or appropriate documentation into their immediate supervisor.

Round Rock Independent School District is tightening its [current mask policy](#), restricting exemptions to health and developmental conditions only, following action by the Board of Trustees at a [special called meeting](#) on Tuesday, Aug. 24, 2021. The stricter policy goes into effect on Thursday, Aug. 26.

Last week, the Board approved a temporary mask requirement set to expire on Sept. 17, 2021. The Board's regular monthly meeting is scheduled for Sept. 16, 2021, and the Trustees could vote to extend the requirement at that time if conditions warrant. The requirement approved last week allowed a broad opt-out provision for staff and students. At Tuesday's meeting, Trustees approved a recommendation by Dr. Hafedh Azaiez, Superintendent of Schools, to limit exceptions to health and/or developmental conditions. For exemptions, parents, guardians and staff must complete their [respective forms](#). Once completed, parents and guardians will submit a PDF copy of their documentation or provide appropriate documentation through the [Mask Exemption Document Form](#). Staff will turn in their completed form and/or appropriate documentation into their immediate supervisor. Parents and staff who plan to apply for a health or developmental exemption will have a week to provide documentation and will not be required to wear a mask in the interim.

"I miss seeing the smiling faces of our students and teachers and I can't wait until we can all put our masks away. But that time is not now," Dr. Azaiez said. "We must do all we can to prevent the spread of COVID-19 and keep our school doors open."

The latest recommendation was precipitated by changes in the legal landscape on whether or not school districts have the authority to require masks. Late last week, the [Texas Education Agency](#) released new guidance that the state is currently not enforcing the governor's executive order banning mask requirements in public schools due to ongoing legal battles in state and federal courts. Also, the Texas Supreme Court declined to overturn temporary restraining orders requiring masks in public schools, including an order that applies to Round Rock ISD schools located in Travis County and the City of Austin.

Under the updated mask protocol, all students, teachers, staff members and adult visitors, including Trustees, must wear masks on buses and while inside school buildings when six feet of distance cannot be maintained. Students and staff have the option to remove their masks while seated in cafeterias and staff lunchrooms and while outdoors. Masks may be removed for activities during athletics, fine arts, and physical education classes if deemed appropriate by the coach, director or instructor.

Local health authorities from Travis and Williamson counties, and the [Centers for Disease Control and Prevention](#), recommend that students, staff, and visitors wear masks at school to mitigate the current community spread of COVID-19, particularly considering the disease's heightened transmission and infection rate primarily caused by the more transmissible "Delta" variant. Also, the [American Academy of Pediatrics recommends everyone older than the age of two wear a mask in schools regardless of vaccination status](#).

Currently, local and federal health officials emphasize that masks are the most effective strategy to reduce the chances of transmission and slow the virus' spread.

Round Rock ISD's current [COVID-19 protocols](#) are designed with the guidance of local health agencies and in consideration of the current and developing public health climate. Round Rock ISD will reassess conditions frequently and adjust accordingly.

"Exhibit B"

Superintendent: Mask Requirement for all Schools, Effective Aug. 18

Aug 17, 2021 | [COVID-19](#), [News & Announcements](#)

Thank you for your patience and support as we opened our 2021-22 school year last week. We know our families and staff share mixed emotions about the school year, especially considering the spread of COVID-19 in our community.

I am announcing an update to our [health protocols](#), as we implement a **temporary districtwide mask requirement effective Wednesday, Aug. 18**. We are elevating our response level to “Red” as we continue to see cases of COVID-19 in our schools and community. We will keep the mask requirement in place through Sept. 10. The Board will meet on Sept. 9 for a regular meeting that may include an extension of the mask requirement.

Under the district’s new mask protocol, all students, teachers, staff members, and visitors, must wear masks when indoors, including buses and all school buildings. Students and staff have the option to remove their masks while eating or when outdoors. We will require masks during athletics, fine arts, and physical education classes, practices, and rehearsals unless students are actively exercising, rehearsing, or performing indoors.

Why Require Masks Now

- After four days of reporting this week, we have had 87 [reported cases of COVID-19 on our dashboard](#). Our highest count total from last school year for an entire week was 130 cases on Jan. 29, 2021.
- Officials from Austin Public Health (APH) and the Williamson County and Cities Health District (WCCHD) shared their concerns about rising cases in our region. They strongly recommended requiring masks to help reduce the spread across our community.

Help Keep In-Person Learning Open

We understand our families and staff feel strongly about masks, individual freedoms, and the health crisis. While there may not be common ground on those issues, we can all

agree **in-person learning works best for most students**. We will do everything we can to stay open and keep our students and staff safe.

The following public health and medical organizations have asked schools to require masks:

- [Austin Public Health \(APH\)](#)
- [Williamson County and Cities Health District \(WCCHD\)](#)
- [American Academy of Pediatrics](#)
- [Centers for Disease Control and Prevention](#)

If the spread of a contagious disease like COVID-19 continues in our schools, we may be forced to close portions of buildings or entire schools. It is critical for our entire #1LISD community to come together for the greater good of every student. Our students need us to stay open, and we believe masks can help the cause.

Red Stage

In addition to requiring masks, the [Red stage](#) includes:

- Cohorting (keeping students in pods or common groups).
- Only essential visitors are allowed at campus/district facilities.
- Cover and close water fountains and use water bottle fillers.

It may take time for schools to implement new protocols. Please give our schools grace as they implement the new guidance as quickly as possible.

Next Steps

Board President Trish Bode called a Special Meeting of our Board of Trustees for Monday, Aug. 23 at 6:15 p.m. During the meeting, the Board will discuss a resolution to require masks and health response protocols.

Families who are currently enrolled in the district's remote learning program and wish to transition back to on-campus learning may do so by contacting their school's registrar. We designed our current COVID-19 protocols with the guidance of local health agencies and in

consideration of the current and developing public health crisis. We will continue to monitor the situation in our community and schools, and adjust protocols accordingly and with the guidance of our health departments and the law.

We have been working with our principals on processes and procedures for enforcing the mask requirement in our school buildings. We ask for patience, grace, and support from our students, staff, teachers, and families during this transition.

We made this work last year. It was tough, but we came together to stay open and minimize the health risk in our schools. We can do what's best for most students.

Respectfully,

Bruce Gearing, Ed.D.

Superintendent of Schools



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 15, 2021

The Honorable Dee Hobbs
Williamson County Attorney
405 M.L.K. Street, #7
Georgetown, Texas 78626

Via E-Mail

Re: Whether an executive order is enforceable as a "law" under subsection 1.07(a)(30) of the Penal Code (RQ-0432-KP)

Dear Mr. Hobbs:

We received your request for an attorney general opinion and have designated it as Request No. 0432-KP. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received, unless before that deadline the Attorney General notifies the requesting person in writing that the opinion will be delayed. TEX. GOV'T CODE § 402.042(c)(2). We received your request on September 10, 2021, setting a due date for your opinion of March 9, 2022. However, we note that you have requested an expedited opinion. We will therefore make every effort to respond to your request as promptly as possible.

By copy of this letter we are notifying those listed below of your request and inviting them to submit briefing on your questions if they have a special interest or expertise in the subject matter. The Office of the Attorney General accepts briefing from any interested party. If you are aware of other individuals or entities with an interest in this issue, please forward this invitation for briefing to them or let us know, so that we may notify them as soon as possible. We ask that the briefs be submitted by October 15, 2021, to ensure that this office will have adequate time to review and consider arguments relevant to the request from all interested parties. Briefs may be submitted by e-mail to opinion.committee@oag.texas.gov. Please note that briefs and other correspondence are subject to the Public Information Act.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Virginia K. Hoelscher
Chair, Opinion Committee

VKH/som

Attachment: Request No. 0432-KP

cc: The Honorable Greg Abbott, Governor of Texas
Mr. Luis Saenz, Chief of Staff, Office of the Governor
Mr. Jeff Oldham, General Counsel, Office of the Governor
Dr. Hafeedh Azaiez, Superintendent of Schools, Round Rock Independent School District
Ms. Jenny Wells, Interim General Counsel, Round Rock Independent School District
Mr. Bruce Gearing, Superintendent, Leander Independent School District
Mr. Shawn Swisher, General Counsel, Leander Independent School District
Ms. Joy Baskin, Director of Legal Services, Texas Association of School Boards
Ms. Melissa J. Schank, CEO, Texas Criminal Defense Lawyers Association
Mr. Robert Kepple, Executive Director, Texas District and County Attorneys Association
Ms. Diane Burch Beckham, Staff Senior Counsel, Texas District and County Attorneys Association

First Assistant

Corby Holcomb

Criminal Division Chief

Laura Gorman

Civil Division Chief

Ariane Flores

Director Juvenile Division

Michael Cox

Director Family Justice

Elizabeth Watkins

(Board Certified Child Welfare Law)

DEE HOBBS

COUNTY ATTORNEY

405 M.L.K. Street #7
Georgetown, Texas 78626

General Counsel - Jason Nassour



Office Administrator

Stephanie Lloyd

Chief of Staff

Peggy Vasquez

Chief Investigator

Rudy Gonzalez

Evidence Director

Michael Etheridge

Victim Services Director

Sara Bill

Phone (512) 943-1111 • www.wilco.org/countyattorney • Fax (512) 943-1120

September 10, 2021

RECEIVED

By Opinion Committee at 4:27 pm, Sep 10, 2021

Via Electronic Mail

(opinion.committee@oag.texas.gov)

The Honorable Ken Paxton

Attorney General of the State of Texas

Attention: Opinion Committee

P.O. Box 12548

Austin, Texas 78711-2548

RQ-0432-KP

FILE# ML-49017-21

I.D.# 49017

Re: Request for an opinion regarding whether a governor's emergency disaster order, proclamation, or regulation issued under the authority of Chapter 418, Government Code, falls within the definition of "law" under the Penal Code

Attorney General Paxton:

The Williamson County Attorney's Office respectfully requests your opinion on the following issue:

Question:

Is a governor's order issued pursuant to the authority granted in Chapter 418 of the Government Code and having the "force and effect of law" enforceable as "law" as that term is defined in section 1.07(a)(30) of the Penal Code?

Background:

The Texas Disaster Act of 1975 provides that "[t]he governor by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent." Tex. Gov't Code §418.014(a). On March 13, 2020, Governor Abbott declared a statewide disaster in response to the imminent threat posed by COVID-19. Proclamation by the Governor of the State of Texas, issued Mar. 13, 2020 (https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf). The disaster declaration has been subsequently renewed and numerous executive orders issued in response. See "News—Proclamations," Office of the Texas Governor: Greg Abbott (<https://gov.texas.gov/news/category/proclamation>); "Governor Abbott Renews COVID-19 Disaster Declaration In August 2021," Office of the Texas Governor: Greg Abbott, issued Aug. 30, 2021 (<https://gov.texas.gov/news/post/governor-abbott-renews-covid-19-disaster-declaration-in-august-2021>). "Those orders cover

a broad range of issues, including data collection and reporting, hospital capacity, mitigation efforts, air transportation, jails, face coverings, and more recently, the safe re-opening for segments of Texas society.” *State v. El Paso County*, 618 S.W.3d 812, 815 (Tex. App.—El Paso 2020, no pet.).

On July 29, 2021, Governor Abbott issued *Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster* (herein referred to as “Executive Order No. GA-38”), in which he ordered that “no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering.” Tex. Exec. Order No. GA-38 (July 29, 2021), https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf. The order further denies any “governmental entity, including a county, city, school district, and public health authority” or “governmental official” the ability to “require any person to wear a face covering or to mandate that another person wear a face covering.” Tex. Exec. Order No. GA-38. Under the authority of Section 418.173, Texas Government Code, and the State’s emergency management plan, Executive Order No. GA-38 provides that “the imposition of any conflicting or inconsistent limitation by a local governmental entity or official” or “the imposition of any such face-covering requirement by a local government entity or official constitutes a ‘failure to comply with’ this executive order that is subject to a fine up to \$1,000.” Tex. Exec. Order No. GA-38. Several governmental entities in Williamson County have imposed requirements that individuals wear face coverings despite Executive Order No. GA-38. See Exhibit A (“Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions,” issued Aug. 25, 2021); Exhibit B (“Superintendent: Mask Requirement for all Schools, Effective Aug. 18,” issued Aug. 17, 2021).

While Executive Order No. GA-38 contains a method of enforcement through fine, provisions of the Penal Code may also be applicable to violations by governmental officials. Specifically, Texas Penal Code section 39.02(a)(1) criminalizes the acts of a public servant who, “with intent to obtain a benefit or with intent to harm or defraud another, [...] intentionally or knowingly violates a law relating to the public servant’s office or employment.”¹ Tex. Penal Code §39.02(a)(1). Within Chapter 39, Penal Code, a “[l]aw relating to a public servant’s office or employment” “means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly: (A) imposes a duty on the public servant; or (B) governs the conduct of the public servant.” Tex. Penal Code §39.01(1). “‘Law’ means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute.” Tex. Penal Code §1.07(a)(30).

Executive Order No. GA-38 expressly prohibits any “governmental entity” or “governmental official” from “requir[ing] any person to wear a face covering or to mandate that another person wear a face covering” and thus governs the conduct of governmental officials. Tex. Exec. Order No. GA-38. However, whether a governmental official could be prosecuted under section 39.02(a)(2) for violating Executive Order No. GA-38—assuming the other statutory elements are met—depends on if the governor’s executive order, which has the “force and effect of law,” is a “law” as that term is defined in section 1.07(a)(30), Penal Code.

When interpreting statutory language, words and phrases are read in context and construed according to normal rules of grammar and usage. *Stahmann v. State*, 602 S.W.3d 573, 577 (Tex. Crim. App.

¹ An offense under Penal Code section 39.02(a)(1) is punishable by a fine not to exceed \$4,000 or confinement in jail for a term that does not exceed 365 days or both. Tex. Penal Code §12.21; Tex. Penal Code §39.02(b).

2020); see Tex. Gov't Code §311.011(a). "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Tex. Gov't Code §311.011(b). It is presumed that the Legislature has used every word for a purpose and "that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Wagner v. State*, 539 S.W.3d 298, 306 (Tex. Crim. App. 2018); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006) ("It is an elementary rule of construction that, when possible to do so, effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous."). When construing more than one statute, courts "interpret statutes 'together and harmonize[], if possible,' to give effect to all of the statutory provisions." *State v. Wood*, 575 S.W.3d 929, 935 (Tex. App.—Austin 2019, pet. ref'd) (quoting *Ex parte Gill*, 413 S.W.3d 425, 430 (Tex. Crim. App. 2013)).

Section 418.012, Government Code, which provides that during a disaster, "the governor may issue executive orders, proclamations, and regulations," states that "[e]xecutive orders, proclamations, and regulations have the force and effect of law."² Tex. Gov't Code §418.012; see *Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020) ("The Texas Legislature has given Governor Abbott the authority to issue executive orders in times of emergencies, and those order have the force of a law."); *In re Hotze*, ___ S.W.3d ___, ___, No. 20-0430, 2020 WL 40456034, at *2 (Tex. July 17, 2020) (Devine, J., concurring) ("During declared states of 'disaster,' the Texas Disaster Act of 1975 bestows upon the governor the power to issue executive orders that have the 'force and effect of law.'"); *El Paso County*, 618 S.W.3d at 815 (recognizing that the governor's disaster declarations "become state law"); *Abbott v. Anti-Defamation League Austin*, No. 03-20-00498-CV, 2020 WL 6265526, at *6 (Tex. App.—Austin Oct. 23, 2020), *rev'd* 610 S.W.3d 911 (Tex. 2020) (noting the governor's "proclamation has the force of law"). As a matter of statutory construction, is an executive order issued under the authority of section 418.012 that has "the force and effect of law" criminally enforceable as a "law" under the Penal Code? Does permissible enforcement of the governor's executive orders issued under section 418.178, Government Code, extend to the Penal Code as a "law" that may be violated by a public servant?

As time is of the essence in determining the enforcement of Executive Order No. GA-38, I ask that your office expedite our request. If you have any questions concerning this request, please feel free to contact me. Thank you for your review and consideration of this opinion request.

Respectfully submitted,



Dee Hobbs
Williamson County Attorney

Enc.

Exhibit A—"Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions"
Exhibit B—"Superintendent: Mask Requirement for all Schools, Effective Aug. 18"

² Section 418.173 provides that failure to comply with a state, local, or interjurisdictional emergency management plan or any rule, order, or ordinance adopted under the plan is an offense punishable by a fine not to exceed \$1,000 or confinement in jail for a term that does not exceed 180 days. Tex. Gov't Code section 418.173.

Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions

Aug 25, 2021

Update: [Mask exemption forms](#) were updated on Aug. 26 in order to comply with medical privacy concerns. For exemptions, parents, guardians and staff must complete their [respective forms](#). Once completed, parents and guardians will submit a PDF copy of their documentation or provide appropriate documentation through the [Mask Exemption Document Form](#). Staff will turn in their completed form and/or appropriate documentation into their immediate supervisor.

Round Rock Independent School District is tightening its [current mask policy](#), restricting exemptions to health and developmental conditions only, following action by the Board of Trustees at a [special called meeting](#) on Tuesday, Aug. 24, 2021. The stricter policy goes into effect on Thursday, Aug. 26.

Last week, the Board approved a temporary mask requirement set to expire on Sept. 17, 2021. The Board's regular monthly meeting is scheduled for Sept. 16, 2021, and the Trustees could vote to extend the requirement at that time if conditions warrant. The requirement approved last week allowed a broad opt-out provision for staff and students. At Tuesday's meeting, Trustees approved a recommendation by Dr. Hafedh Azaiez, Superintendent of Schools, to limit exceptions to health and/or developmental conditions. For exemptions, parents, guardians and staff must complete their [respective forms](#). Once completed, parents and guardians will submit a PDF copy of their documentation or provide appropriate documentation through the [Mask Exemption Document Form](#). Staff will turn in their completed form and/or appropriate documentation into their immediate supervisor. Parents and staff who plan to apply for a health or developmental exemption will have a week to provide documentation and will not be required to wear a mask in the interim.

"I miss seeing the smiling faces of our students and teachers and I can't wait until we can all put our masks away. But that time is not now," Dr. Azaiez said. "We must do all we can to prevent the spread of COVID-19 and keep our school doors open."

The latest recommendation was precipitated by changes in the legal landscape on whether or not school districts have the authority to require masks. Late last week, the [Texas Education Agency](#) released new guidance that the state is currently not enforcing the governor's executive order banning mask requirements in public schools due to ongoing legal battles in state and federal courts. Also, the Texas Supreme Court declined to overturn temporary restraining orders requiring masks in public schools, including an order that applies to Round Rock ISD schools located in Travis County and the City of Austin.

Under the updated mask protocol, all students, teachers, staff members and adult visitors, including Trustees, must wear masks on buses and while inside school buildings when six feet of distance cannot be maintained. Students and staff have the option to remove their masks while seated in cafeterias and staff lunchrooms and while outdoors. Masks may be removed for activities during athletics, fine arts, and physical education classes if deemed appropriate by the coach, director or instructor.

Local health authorities from Travis and Williamson counties, and the [Centers for Disease Control and Prevention](#), recommend that students, staff, and visitors wear masks at school to mitigate the current community spread of COVID-19, particularly considering the disease's heightened transmission and infection rate primarily caused by the more transmissible "Delta" variant. Also, the [American Academy of Pediatrics recommends everyone older than the age of two wear a mask in schools regardless of vaccination status](#).

Currently, local and federal health officials emphasize that masks are the most effective strategy to reduce the chances of transmission and slow the virus' spread.

Round Rock ISD's current [COVID-19 protocols](#) are designed with the guidance of local health agencies and in consideration of the current and developing public health climate. Round Rock ISD will reassess conditions frequently and adjust accordingly.

Superintendent: Mask Requirement for all Schools, Effective Aug. 18

Aug 17, 2021 | [COVID-19](#), [News & Announcements](#)

Thank you for your patience and support as we opened our 2021-22 school year last week. We know our families and staff share mixed emotions about the school year, especially considering the spread of COVID-19 in our community.

I am announcing an update to our [health protocols](#), as we implement a **temporary districtwide mask requirement effective Wednesday, Aug. 18**. We are elevating our response level to “Red” as we continue to see cases of COVID-19 in our schools and community. We will keep the mask requirement in place through Sept. 10. The Board will meet on Sept. 9 for a regular meeting that may include an extension of the mask requirement.

Under the district’s new mask protocol, all students, teachers, staff members, and visitors, must wear masks when indoors, including buses and all school buildings. Students and staff have the option to remove their masks while eating or when outdoors. We will require masks during athletics, fine arts, and physical education classes, practices, and rehearsals unless students are actively exercising, rehearsing, or performing indoors.

Why Require Masks Now

- After four days of reporting this week, we have had 87 [reported cases of COVID-19 on our dashboard](#). Our highest count total from last school year for an entire week was 130 cases on Jan. 29, 2021.
- Officials from Austin Public Health (APH) and the Williamson County and Cities Health District (WCCHD) shared their concerns about rising cases in our region. They strongly recommended requiring masks to help reduce the spread across our community.

Help Keep In-Person Learning Open

We understand our families and staff feel strongly about masks, individual freedoms, and the health crisis. While there may not be common ground on those issues, we can all

agree **in-person learning works best for most students**. We will do everything we can to stay open and keep our students and staff safe.

The following public health and medical organizations have asked schools to require masks:

- [Austin Public Health \(APH\)](#)
- [Williamson County and Cities Health District \(WCCHD\)](#)
- [American Academy of Pediatrics](#)
- [Centers for Disease Control and Prevention](#)

If the spread of a contagious disease like COVID-19 continues in our schools, we may be forced to close portions of buildings or entire schools. It is critical for our entire #1LISD community to come together for the greater good of every student. Our students need us to stay open, and we believe masks can help the cause.

Red Stage

In addition to requiring masks, the [Red stage](#) includes:

- Cohorting (keeping students in pods or common groups).
- Only essential visitors are allowed at campus/district facilities.
- Cover and close water fountains and use water bottle fillers.

It may take time for schools to implement new protocols. Please give our schools grace as they implement the new guidance as quickly as possible.

Next Steps

Board President Trish Bode called a Special Meeting of our Board of Trustees for Monday, Aug. 23 at 6:15 p.m. During the meeting, the Board will discuss a resolution to require masks and health response protocols.

Families who are currently enrolled in the district's remote learning program and wish to transition back to on-campus learning may do so by contacting their school's registrar. We designed our current COVID-19 protocols with the guidance of local health agencies and in

consideration of the current and developing public health crisis. We will continue to monitor the situation in our community and schools, and adjust protocols accordingly and with the guidance of our health departments and the law.

We have been working with our principals on processes and procedures for enforcing the mask requirement in our school buildings. We ask for patience, grace, and support from our students, staff, teachers, and families during this transition.

We made this work last year. It was tough, but we came together to stay open and minimize the health risk in our schools. We can do what's best for most students.

Respectfully,

Bruce Gearing, Ed.D.

Superintendent of Schools

From: Gdula, Kimberly <Kimberly.Gdula@oag.texas.gov>
Sent: Wednesday, September 15, 2021 9:36 AM
To: Carlos Lopez
Cc: Kathryn Long; Philip Fraissinet; David Thompson; Dower, Benjamin
Subject: RE: Greg Abbott, et al v public school districts

Thank you for letting me know, Carlos. As I understand it, the judges in the Elgin ISD and Round Rock ISD lawsuits were sent the TRO applications and proposed order and may take action on the application without a hearing. The judge in the Galveston ISD case has requested to meet with counsel regarding the TRO and setting the TI, but that has not been set; I am going to loop you into that email chain. I do not believe we have requested any TRO hearings yet in the other cases, and I am passing along your email to the attorneys handling those cases.

Please let me know if your clients are willing to waive service, in which case I will get waivers over to you.

Kimberly Gdula
Assistant Attorney General
General Litigation Division
(512) 475-4071 (Direct)
(512) 320-0667 (Fax)

From: Carlos Lopez <clopez@thompsonhorton.com>
Sent: Wednesday, September 15, 2021 9:20 AM
To: Gdula, Kimberly <Kimberly.Gdula@oag.texas.gov>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>; Dickerson, Todd <Todd.Dickerson@oag.texas.gov>
Cc: Kathryn Long <klong@thompsonhorton.com>; Philip Fraissinet <pfraissinet@thompsonhorton.com>; David Thompson <dthompson@thompsonhorton.com>
Subject: Greg Abbott, et al v public school districts

Good morning Kim, Benjamin and Todd:

Given that you have already sought (and apparently obtained) ex parte relief against at least one school district, I want to make sure that you and the other counsel representing the Governor are on notice that we have been retained to represent the following list of public school districts ("ISDs") with respect to lawsuits that you have or may soon be filing. We will likely be retained to represent additional ISDs, and will advise you as that happens. But currently, we represent the following school districts:

Diboll ISD
Elgin ISD
Galveston ISD
La Vega ISD
Longview ISD
Lufkin ISD
Midway ISD
Richardson ISD
Round Rock ISD
Spring ISD
Waco ISD

Therefore, we expect that you will notify our office, in advance of any request for injunctive or expedited relief of any kind in these lawsuits. I also request that you notify other Assistant AG's who may be involved in the filing of these suits, in addition to those who are on this email notification. Thank you.

Regards,

Carlos Lopez, Partner | [vcard](#)
500 North Akard Street, Suite 3150
Dallas, Texas 75201
T: 972.734.5490 | M: 214.334.7592 | F: 972.534.1495
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From: Gdula, Kimberly <Kimberly.Gdula@oag.texas.gov>
Sent: Wednesday, September 15, 2021 9:50 AM
To: Carlos Lopez
Cc: Kathryn Long; Philip Fraissinet; David Thompson; Dower, Benjamin
Subject: RE: Greg Abbott, et al v public school districts

Carlos,

Sorry for the flurry of emails, but I wanted to give you an additional update on Round Rock ISD. We have been informed that Judge Kennon signed the TRO yesterday, but it has not been entered into the docket. The court manager is letting the judge know that Round Rock ISD is represented by counsel.

Thank you,

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Assistant Attorney General
General Litigation Division
(512) 475-4071 (Direct)
(512) 320-0667 (Fax)

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Regards,

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No. _____

**IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT OF TEXAS IN AUSTIN**

In re ROUND ROCK INDEPENDENT SCHOOL DISTRICT, BOARD OF TRUSTEES OF ROUND ROCK INDEPENDENT SCHOOL DISTRICT, DR. HAFEDH AZAIEZ, in his official capacity as superintendent of the Round Rock Independent School District, and AMY WEIR, AMBER FELLER, TIFFANIE HARRISON, DR. JUN XIAO, DR. MARY BONE, CORY VESSA, AND DANIELLE WESTON, in their official capacities as trustees of the Round Rock Independent School District,

Relators.

On Petition for Writ of Mandamus
to the 368th Judicial District Court, Williamson County

MANDAMUS RECORD

TAB	DOCUMENT NAME	PAGE
1.	State of Texas's Verified Original Petition and Applications for Temporary and Permanent Injunctive Relief	R. 1–37
2.	Order Granting State of Texas's Application for a Temporary Restraining Order	R. 38–40
3.	Brief for Amicus Curiae Disability Rights Texas	R. 41–107
4.	Verification and Statement in Accordance with Tex. R. App. P. 52.7	R. 108

Governor—not a patchwork of county judges, city mayors, superintendents, or school boards—the leader of the State’s response to and recovery from a statewide emergency.²

2. GA-38 is a statewide order, issued using statewide emergency powers, with a statewide legal effect. It has the force and effect of state law, and state law preempts inconsistent local law. Defendants disagree with Governor Abbott’s policy choice. But Defendants must recognize the fact that they are not above the law. Round Rock ISD’s mask mandate should be immediately enjoined.

**REQUEST FOR AN EXPEDITED HEARING ON THE STATE’S APPLICATIONS FOR A
TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION**

3. Given the important and urgent issues raised in this action, the State requests an expedited setting on its applications for a temporary restraining order and a temporary injunction.

4. The State is seeking non-monetary relief. Discovery is intended to be conducted under Level 1.

PARTIES

5. Plaintiff is the State of Texas.

6. Defendant Round Rock Independent School District (“Round Rock ISD”) has approximately 48,421 students enrolled from Pre-Kindergarten to Grade 12.

7. Defendant Board of Trustees of Round Rock ISD is the board of trustees for Round Rock ISD.

8. Defendant Dr. Hafeedh Azaiez is the superintendent of Round Rock ISD.

² *Id.* § 418.011.

9. Defendants Amy Weir, Amber Feller, Tiffanie Harrison, Dr. Jun Xiao, Dr. Mary Bone, Cory Vessa, and Danielle Weston are members of the Round Rock ISD Board of Trustees.

10. Defendants may be served with process through Amy Weir, the president of the Round Rock ISD Board of Trustees, or through Dr. Hafeedh Azaiez, the Round Rock ISD superintendent.

JURISDICTION AND VENUE

11. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over the action under Article V, Section 8 of the Texas Constitution and section 24.007 of the Texas Government Code, as well as under sections 37.001 and 37.003 of the Texas Uniform Declaratory Judgments Act and section 65.021 of the Texas Civil Practice and Remedies Code.

12. Venue is proper in Williamson County under section 15.002(a)(1), (a)(2), and (a)(3), and under § 15.0151 of the Texas Civil Practices and Remedies Code.

BACKGROUND

I. The Texas Disaster Act of 1975 Makes the Governor the Leader of the State's Emergency Response.

13. Two core purposes of the Texas Disaster Act of 1975 ("TDA") are to: (1) mitigate the "damage, injury, and loss of life and property" resulting from a disaster; and (2) "provide a setting conducive to the rapid and orderly restoration and rehabilitation of persons and property affected by disasters."³

³ Tex. Gov't Code § 418.002(1), (3).

14. The TDA names the Governor the “commander in chief” of the State’s response to a disaster⁴ and makes him “responsible for meeting . . . the dangers to the state and people presented by disasters.”⁵

15. The TDA grants the Governor vast powers to meet this obligation, which include the power to: (1) issue executive orders carrying “the force and effect of law”;⁶ (2) control the movement of persons and occupancy of premises;⁷ (3) suspend statutes, orders, or rules;⁸ and (4) use all available public resources, including resources of cities and counties.⁹

16. The TDA makes certain local officials “agents” of the Governor and gives them powers subordinate to the Governor’s.¹⁰ Local officials who preside over an incorporated city or a county—meaning city mayors and county judges—are deemed “emergency management directors.”¹¹ These directors “serve[] as the governor’s designated agent in the administration and supervision of duties under this chapter.”¹² When serving in this capacity, these directors “may exercise the powers granted to the governor under this chapter on an appropriate local scale.”¹³

17. The TDA also allows these same local officials the power to control the movement of persons and the occupancy of premises in a local disaster area.¹⁴ But as

⁴ *Id.* § 418.015(c).

⁵ *Id.* § 418.011.

⁶ *Id.* § 418.012.

⁷ *Id.* § 418.018(c).

⁸ *Id.* § 418.016(a).

⁹ *Id.* § 418.017(a).

¹⁰ *Id.* § 418.1015(b).

¹¹ *Id.* § 418.1015(a).

¹² *Id.* § 418.1015(b).

¹³ *Id.*

¹⁴ *Id.* § 418.108(g).

a power under “this chapter,” emergency management directors can wield it only in their capacities as the Governor’s “designated agent[s].”¹⁵

18. The TDA does not confer on county judges, city mayors, or any other local officials an independent power to issue emergency orders carrying the force and effect of law.

19. School districts are included in the definition of “local government entities” applicable to the TDA.¹⁶ Although recognizing that school districts are “local governmental entities” under the TDA, the Legislature did not delegate to those school districts specific authority to respond to disasters. Instead, that authority was delegated to the Governor.¹⁷

II. GA-38 Protects Individual Autonomy in Making Personal Health Decisions.

20. On July 29, 2021, Governor Abbott issued executive order GA-38.¹⁸

21. GA-38 seeks to create a uniform response to the COVID-19 pandemic, one that gives individuals the autonomy to make personal health decisions free from government control.¹⁹

22. Towards this end, GA-38 enacts limits to “ensure that vaccines continue to be voluntary for all Texans and that Texans’ private COVID-19-related health information continues to enjoy protection against compelled disclosure...”²⁰

¹⁵ *Id.* § 418.1015(b).

¹⁶ *See* Tex. Gov’t. Code § 418.004(10).

¹⁷ *See id.* at §§ 418.011–.026.

¹⁸ A copy of GA-38 is attached hereto as Exhibit A. GA-38 is publicly available at <https://tinyurl.com/eo-ga-38>.

¹⁹ *See id.* at p. 1.

²⁰ *Id.* at pp. 2–3.

23. Also, GA-38 protects businesses and other establishments from “COVID-19-related operating limits.”²¹

24. Further, GA-38 bans most state and local officials from mandating the wearing of facemasks.²² GA-38 contains an exception that allows certain institutions—state supported living centers, government-owned hospitals, and jails—to require the wearing of facemasks.²³

25. To ensure individual autonomy and promote uniformity, GA-38 supersedes conflicting local emergency orders.²⁴ For the same reasons, GA-38 also suspends certain listed statutes and any others “to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order.”²⁵

26. Importantly, under GA-38, any person who wants to wear a facemask, get a vaccine, or engage in social distancing can still do so.²⁶ GA-38 “strongly encourage[s]” such practices.²⁷ But GA-38 leaves individuals free to follow the safe practices they should have already mastered over the last 18 months.²⁸

27. GA-38’s prohibition on local officials’ facemask mandates falls comfortably within Governor Abbott’s broad power to “control ingress and egress to

²¹ *Id.* at p. 3

²² *Id.* at pp. 3–4.

²³ *Id.* at p. 4.

²⁴ *Id.* at pp. 3–4.

²⁵ *Id.* at pp. 3–5.

²⁶ *Id.* at pp. 4.

²⁷ *Id.* at pp. 1.

²⁸ *Id.* at pp. 3.

and from a disaster area and the movement of persons and occupancy of premises in the area.”²⁹

28. Specifically, GA-38’s ban on facemask mandates controls “ingress and egress” to, “movement” in, and “occupancy of” a disaster area as it authorizes the entry of students into schools who would be prohibited if a school district was to require the wearing of facemasks. GA-38 also controls the conditions individuals may be subjected to when “occupying” premises in a disaster area.

III. Round Rock ISD Issues a Facemask Mandate in Defiance of GA-38.

29. On or about August 16, 2021, Round Rock ISD’s Board of Trustees voted to mandate masks for all students, teachers, staff members, and adult visitors beginning August 18, 2021 (“Defendants’ Facemask Order”).³⁰ Round Rock ISD’s Board of Trustees subsequently updated Defendants’ Facemask Order to require individuals seeking an exemption from the policy to submit documentation establishing health or developmental circumstances that warrant excusing them from Defendants’ Facemask Order.³¹

30. Defendants’ Facemask Order is barred by GA-38, which explicitly prohibits local officials such as Defendants from issuing facemask mandates in response to COVID-19.

²⁹ Tex. Gov’t Code § 418.018(c).

³⁰ Round Rock ISD NEWS: Masks to be temporarily required at all Round Rock ISD schools and facilities (August 17, 2021; updated on or about August 25, 2021), *available at* <https://news.roundrockisd.org/2021/08/17/masks-to-be-temporarily-required-at-all-round-rock-isd-schools-and-facilities/> (last visited September 9, 2021). A copy of this webpage is attached hereto as Exhibit B.

³¹ *Id.*

31. On August 17, 2021, the Office of Attorney General sent a letter to Round Rock ISD Superintendent Azaiez, warning that the imposition of the mask mandate exceeded his authority and violated GA-38. The letter requested an acknowledgment “that in light of the [Texas Supreme] Court’s rulings, you will rescind your local policy requiring masks in public schools or, alternatively, not enforce it pending the Supreme Court’s disposition of the cases before it involving this issue. Otherwise, you will face legal action taken by my office to enforce the Governor’s order and protect the rule of law.”³²

32. As of September 9, 2021, Round Rock ISD and Superintendent Azaiez have not rescinded the mandatory masking policy in response to the letter from Attorney General Paxton’s office, and furthermore, they have indicated their intent to continue defying GA-38.³³

CLAIMS FOR RELIEF

33. Pursuant to Texas’s Uniform Declaratory Judgment Act and *ultra vires* and preemption principles, the State alleges as follows:

34. GA-38 has the force and effect of law. GA-38 preempts school district rules that are in direct conflict with its prohibition on mask mandates. School districts’ general statutory authority does not allow them to violate GA-38. In the event of a conflict between school districts’ general authority and GA-38’s specific prohibition, GA-38’s specific prohibition controls. Therefore, the State requests a

³² Exhibit C (Aug. 17, 2021 letter to Dr. Azaiez).

³³ See Ex. B.

declaration that the enactment and enforcement of Defendants' Facemask Order is invalid, unlawful, and constitutes an *ultra vires* act.

APPLICATIONS FOR A TEMPORARY RESTRAINING ORDER
AND A TEMPORARY INJUNCTION

35. A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be held on a temporary injunction.³⁴ “A temporary injunction’s purpose is to preserve the status quo of the litigation’s subject matter pending a trial on the merits.”³⁵ The applicant must prove three elements to obtain a temporary injunction: (1) a cause of action against the adverse party; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.³⁶ These requirements are readily met here.

I. The State will Likely Succeed on the Merits.

36. The State will likely succeed on the merits because (1) GA-38 expressly preempts Defendants' Facemask Order and (2) Governor Abbott lawfully suspended Defendants' statutory authority to issue their Facemask Order.

A. GA-38 Expressly Preempts Defendants' Facemask Order.

37. The point is simple. Governor Abbott's emergency orders carry the force and effect of law.³⁷ His emergency orders, which are issued using statewide powers and which have a statewide legal effect, are effectively “state laws.” Traditional

³⁴ *Texas Aeronautics Commission v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971).

³⁵ *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

³⁶ *Id.*

³⁷ Tex. Gov't Code § 418.012.

preemption principles dictate that when a state law conflicts with a local law, the state law controls.³⁸

38. Here, GA-38 supersedes and preempts any local orders or local requirements that are inconsistent with GA-38.³⁹ Defendants' Facemask Order imposes facemask requirements that are at odds with, and expressly prohibited by, GA-38. As such, Defendants' Facemask Order is expressly preempted by GA-38 and thus should be enjoined.

39. A review of the Legislature's intent, which is a focus of a preemption analysis,⁴⁰ supports this conclusion. Recently, an array of public officials—the Governor, city mayors, county judges, public health authorities, school board trustees, etc.—have been relying on different statutes to issue conflicting orders on the facemask issue. One of these orders *must* control.

40. Of these officials, the Governor is the only one with the authority to issue (1) *statewide* emergency orders⁴¹ (2) that explicitly carry the force and effect of *state* laws.⁴² Also, the Governor is the only official made explicitly responsible for meeting the dangers to the state and its people presented by a disaster.⁴³ Further, the Governor is the only one with the emergency powers to suspend laws;⁴⁴ use all

³⁸ See, e.g., *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 18–19 (Tex. 2016); see also *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018); *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).

³⁹ Ex. A at pp. 3–4.

⁴⁰ *BCCA Appeal Group, Inc.*, 496 S.W.3d at 8.

⁴¹ See Tex. Gov't Code §§ 418.014–.015.

⁴² *Id.* § 418.012.

⁴³ *Id.* § 418.011.

⁴⁴ *Id.* § 418.016(a).

available public resources, including resources of cities and counties;⁴⁵ and control the movement of persons and occupancy of premises on a statewide level.⁴⁶ The Legislature’s intent is clear. In the event of a conflict, Governor Abbott’s emergency orders control; his orders *must* have preemptive effect or else they are meaningless.

41. This conclusion is further supported by the principle that specific statutes control over local ones when a conflict is irreconcilable.⁴⁷ But here harmonization *is* possible: school districts’ general authority is not abolished, but merely circumscribed, by GA-38’s prohibitions. Just as the general authority of a board of trustees does not exempt a school district from complying with a municipal building code,⁴⁸ so too does that general authority not exempt a school district from complying with GA-38. GA-38’s ban on mask mandates functions as a particular limit on school districts’ general authority.

42. The TDA reflects the Legislature’s comprehensive allocation of powers and responsibilities during declared disasters. School districts are subject to the TDA and GA-38 just like any other state law.⁴⁹ In the context of conflicting orders targeted at the subject of a declared disaster, the TDA is what controls, not the general-authority statutes Defendants will likely rely on when opposing this Petition.

43. Further, any alternative conclusion would have absurd and potentially disastrous results. As noted above, the Legislature gave only the Governor the

⁴⁵ *Id.* § 418.017.

⁴⁶ *Id.* § 418.018.

⁴⁷ *See, e.g., id.* § 311.026.

⁴⁸ *See Port Arthur Indep. Sch. Dist. v. City of Groves*, 376 S.W.2d 330, 334 (Tex. 1964).

⁴⁹ *Univ. Interscholastic League v. Midwestern Univ.*, 152 Tex. 124, 134, 255 S.W.2d 177, 183 (Tex. 1953) (“Nobody can question that the public schools of this state ‘are quasi public entities and are subject to direct statutory control’ by the Legislature.”).

emergency power to issue orders carrying the force and effect of law. City mayors and county judges are not granted this specific power—and school boards are certainly not included in this grant of emergency authority.⁵⁰ And if the Governor’s orders under the TDA could not preempt school district rules, then county judges’ and city mayors’ orders—orders that are *not* imbued with the force and effect of law—could not preempt either. This inversion of authority would turn dozens of state and local emergency orders into impotent non-binding recommendations. It would make school board trustees, superintendents, and other local officials—individuals who the TDA does not even meaningfully contemplate—the true leaders of the State’s response to a statewide emergency. This is not what the Legislature intended when it enacted the TDA, and it is not the law.

44. In sum, GA-38 was a lawful use of Governor Abbott’s power to preempt inconsistent local orders. It has the force and effect of state law and must be followed, regardless of whether local officials agree with it. Defendants acted *ultra vires* when they issued a facemask mandate barred by GA-38.

B. Governor Abbott Suspended Defendants’ Authority to Issue a Mandatory Facemask Requirement Under the Circumstances.

45. Governor Abbott, using his TDA-granted power,⁵¹ suspended “any . . . relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to this COVID-19 disaster that are inconsistent with this executive order”⁵² Under the circumstances, Defendants had no authority to

⁵⁰ See Tex. Gov’t Code § 418.108.

⁵¹ TEX. GOV’T CODE § 418.016(a).

⁵² Ex. A at ¶ 5.

issue and enforce a mandatory facemask requirement that is expressly barred by GA-38. This makes Defendants’ Facemask Order invalid and their conduct *ultra vires*.

46. In *State v. El Paso County*, the El Paso Court of Appeals found that this suspension power should be interpreted broadly.⁵³ That court noted that the common dictionary meaning for the term “regulate” included “to control or supervise by means of rules and regulations.”⁵⁴ The court found that § 418.018 and the local emergency order issued thereunder fit within the “classic definition of regulation.”⁵⁵

47. The court then analyzed the term “state business.” The court found that “state business” did not “mean only the activities of state agencies and actors.”⁵⁶ The court reasoned that “had the Legislature meant to so limit the term, it would have said ‘official state business,’ as it has done in many other statutes.”⁵⁷ The court found that the local emergency order’s restrictions readily qualified as matters of “state business” under this interpretation.⁵⁸ The El Paso Court of Appeals’ reasoning applies equally here.

48. Realistically, in the context of a worldwide pandemic, even local disaster responses are matters of “state business,” especially when local officials are undermining the Governor’s attempt to craft a uniform statewide response to that pandemic. GA-38’s suspensions are valid under § 418.016(a).

⁵³ 618 S.W.3d 812, 823–25 (Tex. App.—El Paso 2020, no pet.), mandamus dismissed (Nov. 20, 2020).

⁵⁴ *Id.* at 824 (citing various dictionaries).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (citing Tex. Gov’t Code §§ 660.009, 660.043, 1232.003).

⁵⁸ *Id.*

49. To be clear, GA-38 is supported by two independent gubernatorial powers—the power to preempt and the power to suspend. Knock out just one of these powers, and GA-38 is lawful under the other. Defendants will need to invalidate both powers to overcome the State’s claims. Defendants will not be able to do so.

II. The State will be Irreparably Injured Absent an Injunction.

50. The State’s injuries are irreparable. The Supreme Court of Texas recently held as much in *State v. Hollins*.⁵⁹

51. There, the Court explained that a century’s worth of precedent establishes “the State’s ‘justiciable interest in its sovereign capacity in the maintenance and operation of its municipal corporation in accordance with law.’”⁶⁰ The Court noted that an *ultra vires* suit is a necessary tool to reassert the State’s control over local officials who are misapplying or defying State laws.⁶¹ The Court reasoned: “[This] tool would be useless . . . if the State were required to demonstrate additional, particularized harm arising from a local official’s specific unauthorized actions.”⁶²

52. The Court continued that “[t]he [State] would be impotent to enforce its own laws if it could not temporarily enjoin those breaking them pending trial.”⁶³ The Court found that, “[w]hen the State files suit to enjoin *ultra vires* action by a local

⁵⁹ 620 S.W.3d 400, 410 (Tex. 2020).

⁶⁰ *Id.* (quoting *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

official, a showing of likely success on the merits is sufficient to satisfy the irreparable-injury requirement for a temporary injunction.”⁶⁴

53. Per *Hollins*, the irreparable injury requirement favors the State.

54. The El Paso Court of Appeals rightly viewed *Hollins* “as controlling” on the irreparable injury issue.⁶⁵

III. Emergency Injunctive Relief is Necessary to Preserve the Status Quo.

55. “The status quo is the last actual, peaceable, noncontested status which preceded the pending controversy.”⁶⁶ There was no controversy over Defendants’ Facemask Order until they issued that order, which occurred after Governor Abbott enacted GA-38. The State is merely asking to bring Defendants back to their position prior to their facemask mandate.

56. The Texas Supreme Court has given unequivocal direction to lower courts who are considering local officials’ attempt to usurp the Governor’s power to control the direction of the State’s response to the COVID-19 pandemic. The status quo favors the State.

57. Recently, the Texas Supreme Court overturned two temporary restraining orders and one temporary injunction enjoining GA-38’s ban on facemask mandates.⁶⁷ Each time, the Court overturned these injunctions because they altered the status quo.⁶⁸

⁶⁴ *Id.*

⁶⁵ *El Paso County*, 618 S.W.3d at 826.

⁶⁶ *Sharma v. Vinmar Intern., Ltd.*, 231 S.W.3d 405, 419 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

⁶⁷ See Exhibits D–F.

⁶⁸ *Id.*

58. The Court spoke in particularly clear and unmistakable terms in its most recent order dated August 26, 2021.⁶⁹ The Court explained that these facemask cases turn on a pure legal question: “[W]hich government officials have the legal authority to decide what the government’s position on [facemasks] will be.”⁷⁰ The Court continued: “The status quo, for many months, has been gubernatorial oversight of such decisions at both the state and local levels.”⁷¹ The Court held that the status quo of “gubernatorial oversight” of disaster-related decisions “should remain in place while the court of appeals, and potentially this Court, examine the parties’ merits arguments to determine whether plaintiffs have demonstrated a probable right to the relief sought.”⁷²

59. Texas Supreme Court precedent requires that this Court enjoin Defendants’ Facemask Order and restore the status quo of gubernatorial control. Binding precedent still matters, even during a pandemic.

APPLICATION FOR A PERMANENT INJUNCTION

60. The State also asks the Court to set its request for a permanent injunction for a trial on the merits, and after the trial, issue a permanent injunction as set forth above.

PRAYER

61. For the reasons discussed above, the State respectfully prays that this Court:

⁶⁹ Ex. F.

⁷⁰ *Id.* at ¶ 2.

⁷¹ *Id.*

⁷² *Id.*

- A. Through counsel below, enter an appearance for the State in this cause;
- B. Issue a temporary restraining order, which will remain in force until a temporary injunction hearing is held, restraining Defendants and any of their officers, agents, servants, employees, attorneys, representatives, or any other persons in active concert or participation with them who receive actual notice of the Order from enforcing Defendants' Facemask Order for as long as GA-38 (or a future executive order containing the same prohibitions) remains in effect;
- C. Set a date and time for a hearing on the State's application for a temporary injunction;
- D. Declare Defendants' Facemask Order to be invalid and unlawful;
- E. Issue preliminary and permanent injunctions that order Defendants to: (1) stop, or order stopped, all enforcement efforts of their Facemask Order; (2) rescind their Facemask Order; and (3) refrain from issuing any new emergency restrictions that conflict with GA-38;
- F. Award Supplemental Relief under Tex. Civ. Prac. & Rem. Code § 37.011 as necessary to enforce the declaratory judgment issued by this Court;
- G. Award attorneys' fees and costs; and
- H. Award any further relief that the Court deems just and proper.

Respectfully submitted,

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Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN COWLES
Deputy Attorney General for Civil Litigation

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ATTORNEYS FOR THE STATE OF TEXAS

CAUSE NO. _____

STATE OF TEXAS,
Plaintiff,

V.

ROUND ROCK INDEPENDENT SCHOOL DISTRICT, BOARD OF TRUSTEES OF ROUND ROCK INDEPENDENT SCHOOL DISTRICT, DR. HAFEDH AZAIEZ in his official capacity as superintendent of the Round Rock Independent School District, and AMY WEIR, AMBER FELLER, TIFFANIE HARRISON, DR. JUN XIAO, DR. MARY BONE, CORY VESSA, and DANIELLE WESTON, in their official capacities as trustees of the Round Rock Independent School District,

Defendants.

IN THE DISTRICT COURT

WILLIAMSON COUNTY, TEXAS

____ JUDICIAL DISTRICT

**DECLARATION OF KIMBERLY GDULA IN SUPPORT OF THE STATE OF TEXAS'S
VERIFIED ORIGINAL PETITION AND APPLICATIONS FOR TEMPORARY
AND PERMANENT INJUNCTIVE RELIEF**

State of Texas

County of Travis

My name is Kimberly Gdula, my date of birth is October 27, 1982, and my address is P.O. Box 12548, Capital Station Austin, Texas 78711, USA. I declare under penalty of perjury that the facts contained in the State of Texas's Verified Original Petition and Applications for Temporary and Permanent Injunctive Relief are true and correct. This verification is based on my review of the State and local emergency

orders in question and other publicly available materials which this Court will be able to take judicial notice of.

Executed in Travis County, State of Texas, on the 9th day of September 2021.



Kimberly Gdula

EXHIBIT A



GOVERNOR GREG ABBOTT

July 29, 2021

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SECRETARY OF STATE
3:15 PM O'CLOCK

JUL 29 2021

Secretary of State

Mr. Joe A. Esparza
Deputy Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701

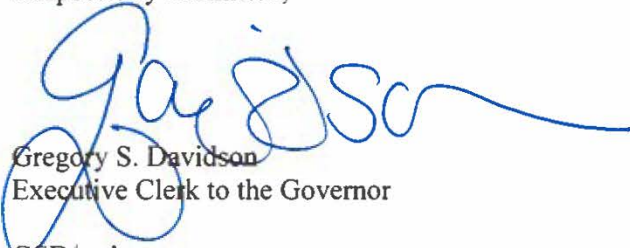
Dear Deputy Secretary Esparza:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster.

The original executive order is attached to this letter of transmittal.

Respectfully submitted,


Gregory S. Davidson
Executive Clerk to the Governor

GSD/gsd

Attachment

Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
July 29, 2021

EXECUTIVE ORDER GA 38

Relating to the continued response to the COVID-19 disaster.

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all Texas counties; and

WHEREAS, in each subsequent month effective through today, I have renewed the COVID-19 disaster declaration for all Texas counties; and

WHEREAS, from March 2020 through May 2021, I issued a series of executive orders aimed at protecting the health and safety of Texans, ensuring uniformity throughout Texas, and achieving the least restrictive means of combatting the evolving threat to public health by adjusting social-distancing and other mitigation strategies; and

WHEREAS, combining into one executive order the requirements of several existing COVID-19 executive orders will further promote statewide uniformity and certainty; and

WHEREAS, as the COVID-19 pandemic continues, Texans are strongly encouraged as a matter of personal responsibility to consistently follow good hygiene, social-distancing, and other mitigation practices; and

WHEREAS, receiving a COVID-19 vaccine under an emergency use authorization is always voluntary in Texas and will never be mandated by the government, but it is strongly encouraged for those eligible to receive one; and

WHEREAS, state and local officials should continue to use every reasonable means to make the COVID-19 vaccine available for any eligible person who chooses to receive one; and

WHEREAS, in the Texas Disaster Act of 1975, the legislature charged the governor with the responsibility “for meeting ... the dangers to the state and people presented by disasters” under Section 418.011 of the Texas Government Code, and expressly granted the governor broad authority to fulfill that responsibility; and

WHEREAS, under Section 418.012, the “governor may issue executive orders ... hav[ing] the force and effect of law;” and

WHEREAS, under Section 418.016(a), the “governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business ... if strict compliance with the provisions ... would in any way prevent, hinder, or delay necessary action in coping with a disaster;” and

WHEREAS, under Section 418.018(c), the “governor may control ingress and egress to

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and from a disaster area and the movement of persons and the occupancy of premises in the area;" and

WHEREAS, under Section 418.173, the legislature authorized as "an offense," punishable by a fine up to \$1,000, any "failure to comply with the [state emergency management plan] or with a rule, order, or ordinance adopted under the plan;"

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective immediately:

1. To ensure the continued availability of timely information about COVID-19 testing and hospital bed capacity that is crucial to efforts to cope with the COVID-19 disaster, the following requirements apply:
 - a. All hospitals licensed under Chapter 241 of the Texas Health and Safety Code, and all Texas state-run hospitals, except for psychiatric hospitals, shall submit to the Texas Department of State Health Services (DSHS) daily reports of hospital bed capacity, in the manner prescribed by DSHS. DSHS shall promptly share this information with the Centers for Disease Control and Prevention (CDC).
 - b. Every public or private entity that is utilizing an FDA-approved test, including an emergency use authorization test, for human diagnostic purposes of COVID-19, shall submit to DSHS, as well as to the local health department, daily reports of all test results, both positive and negative. DSHS shall promptly share this information with the CDC.
2. To ensure that vaccines continue to be voluntary for all Texans and that Texans' private COVID-19-related health information continues to enjoy protection against compelled disclosure, in addition to new laws enacted by the legislature against so-called "vaccine passports," the following requirements apply:
 - a. No governmental entity can compel any individual to receive a COVID-19 vaccine administered under an emergency use authorization. I hereby suspend Section 81.082(f)(1) of the Texas Health and Safety Code to the extent necessary to ensure that no governmental entity can compel any individual to receive a COVID-19 vaccine administered under an emergency use authorization.
 - b. State agencies and political subdivisions shall not adopt or enforce any order, ordinance, policy, regulation, rule, or similar measure that requires an individual to provide, as a condition of receiving any service or entering any place, documentation regarding the individual's vaccination status for any COVID-19 vaccine administered under an emergency use authorization. I hereby suspend Section 81.085(i) of the Texas Health and Safety Code to the extent necessary to enforce this prohibition. This paragraph does not apply to any documentation requirements necessary for the administration of a COVID-19 vaccine.
 - c. Any public or private entity that is receiving or will receive public funds through any means, including grants, contracts, loans, or other disbursements of taxpayer money, shall not require a consumer to provide, as a condition of receiving any service or entering any place, documentation regarding the consumer's vaccination status for any COVID-19 vaccine administered under an emergency use authorization. No consumer may be denied entry to a facility financed

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- in whole or in part by public funds for failure to provide documentation regarding the consumer's vaccination status for any COVID-19 vaccine administered under an emergency use authorization.
- d. Nothing in this executive order shall be construed to limit the ability of a nursing home, state supported living center, assisted living facility, or long-term care facility to require documentation of a resident's vaccination status for any COVID-19 vaccine.
 - e. This paragraph number 2 shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster. I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order.
3. To ensure the ability of Texans to preserve livelihoods while protecting lives, the following requirements apply:
- a. There are no COVID-19-related operating limits for any business or other establishment.
 - b. In areas where the COVID-19 transmission rate is high, individuals are encouraged to follow the safe practices they have already mastered, such as wearing face coverings over the nose and mouth wherever it is not feasible to maintain six feet of social distancing from another person not in the same household, but no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering.
 - c. In providing or obtaining services, every person (including individuals, businesses, and other legal entities) is strongly encouraged to use good-faith efforts and available resources to follow the Texas Department of State Health Services (DSHS) health recommendations, found at www.dshs.texas.gov/coronavirus.
 - d. Nursing homes, state supported living centers, assisted living facilities, and long-term care facilities should follow guidance from the Texas Health and Human Services Commission (HHSC) regarding visitations, and should follow infection control policies and practices set forth by HHSC, including minimizing the movement of staff between facilities whenever possible.
 - e. Public schools may operate as provided by, and under the minimum standard health protocols found in, guidance issued by the Texas Education Agency. Private schools and institutions of higher education are encouraged to establish similar standards.
 - f. County and municipal jails should follow guidance from the Texas Commission on Jail Standards regarding visitations.
 - g. As stated above, business activities and legal proceedings are free to proceed without COVID-19-related limitations imposed by local governmental entities or officials. This paragraph number 3 supersedes any conflicting local order in response to the COVID-19 disaster, and all relevant laws are suspended to the extent necessary to preclude any such inconsistent local orders. Pursuant to the legislature's command in Section 418.173 of the Texas Government Code and the State's emergency management plan, the imposition of any conflicting or inconsistent limitation by a local governmental entity or official constitutes a "failure to comply with" this executive order that is subject to a fine up to \$1,000.

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4. To further ensure that no governmental entity can mandate masks, the following requirements shall continue to apply:
- a. No governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering; provided, however, that:
 - i. state supported living centers, government-owned hospitals, and government-operated hospitals may continue to use appropriate policies regarding the wearing of face coverings; and
 - ii. the Texas Department of Criminal Justice, the Texas Juvenile Justice Department, and any county and municipal jails acting consistent with guidance by the Texas Commission on Jail Standards may continue to use appropriate policies regarding the wearing of face coverings.
 - b. This paragraph number 4 shall supersede any face-covering requirement imposed by any local governmental entity or official, except as explicitly provided in subparagraph number 4.a. To the extent necessary to ensure that local governmental entities or officials do not impose any such face-covering requirements, I hereby suspend the following:
 - i. Sections 418.1015(b) and 418.108 of the Texas Government Code;
 - ii. Chapter 81, Subchapter E of the Texas Health and Safety Code;
 - iii. Chapters 121, 122, and 341 of the Texas Health and Safety Code;
 - iv. Chapter 54 of the Texas Local Government Code; and
 - v. Any other statute invoked by any local governmental entity or official in support of a face-covering requirement.
- Pursuant to the legislature's command in Section 418.173 of the Texas Government Code and the State's emergency management plan, the imposition of any such face-covering requirement by a local governmental entity or official constitutes a "failure to comply with" this executive order that is subject to a fine up to \$1,000.
- c. Even though face coverings cannot be mandated by any governmental entity, that does not prevent individuals from wearing one if they choose.
5. To further ensure uniformity statewide:
- a. This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts services allowed by this executive order or allows gatherings restricted by this executive order. Pursuant to Section 418.016(a) of the Texas Government Code, I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the

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- COVID-19 disaster that are inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.
- b. Confinement in jail is not an available penalty for violating this executive order. To the extent any order issued by local officials in response to the COVID-19 disaster would allow confinement in jail as an available penalty for violating a COVID-19-related order, that order allowing confinement in jail is superseded, and I hereby suspend all relevant laws to the extent necessary to ensure that local officials do not confine people in jail for violating any executive order or local order issued in response to the COVID-19 disaster.

This executive order supersedes all pre-existing COVID-19-related executive orders and rescinds them in their entirety, except that it does not supersede or rescind Executive Orders GA-13 or GA-37. This executive order shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor. This executive order may also be amended by proclamation of the governor.



Given under my hand this the 29th
day of July, 2021.

A handwritten signature in black ink, reading "Greg Abbott".

GREG ABBOTT
Governor

ATTESTED BY:

A handwritten signature in black ink, reading "Joe A. Esparza".
JOE A. ESPARZA
Deputy Secretary of State

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EXHIBIT B

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Masks to be temporarily required at all Round Rock ISD schools and facilities

Aug 17, 2021



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UPDATE: The Board of Trustees approved to update the District's mask requirement during their Aug.25 called meeting. All students, teachers, staff members and adult visitors, including Trustees, must wear masks on buses and while inside school buildings when six feet of distance cannot be maintained. Students and staff have the option to remove their masks while seated in cafeterias and staff lunchrooms and while outdoors. Masks may be removed for activities during athletics, fine arts, and physical education classes if deemed appropriate by the coach, director or instructor. Individuals with health or

developmental circumstances may opt-out by submitting documentation.

Starting Wednesday, Aug. 18, masks will temporarily be required at all Round Rock ISD schools and facilities, following [approval by the Board of Trustees during their Aug. 16 called meeting](#).

The requirement expires on September 17, 2021. The Board's regular monthly meeting is scheduled for September 16, 2021, and the Trustees could vote to extend the requirement at that time if conditions warrant.

Under the District's new mask protocol, all students, teachers, staff members and adult visitors, including Trustees, must wear masks on buses and while inside school buildings when six feet of distance cannot be maintained. Students and staff have the option to remove their masks while seated in cafeterias and staff lunch rooms and while outdoors. The requirement is not effective during athletics, fine arts, and physical education classes unless deemed appropriate by the coach, director or instructor.

"My ultimate responsibility is the health and welfare of our students. We must look at the science, listen to the experts, and do what is right to protect them. As several other superintendents who have made the decision to require masks have said, if we're going to err, I want to err on the side of caution," Superintendent of Schools Dr. Hafedh Azaiez said. "As the public health climate continues to rapidly change, we must be willing to adapt and make decisions to protect our community as we know that masks are an essential tool in reducing the spread of COVID-19."

Local health authorities from Travis and Williamson counties, and the [Centers for Disease Control and Prevention](#), recommend that students, staff, and visitors wear masks at school to mitigate current community spread of COVID-19, particularly considering the disease's heightened transmission and infection rate primarily caused by the more transmissible "Delta" variant. Also, the [American Academy of Pediatrics recommends everyone older than the age of two wear a mask in schools regardless of vaccination status](#). Currently, local and federal health officials emphasize that masks are the most effective strategy to reduce the chances of transmission and slow the virus' spread.

While [Gov. Greg Abbott issued Executive Order GA No. 36 earlier this year, which prohibited schools from issuing a mask mandate](#), several districts across the state have decided to require masks and legal challenges to the governor's order are ongoing. Last school year, Round Rock ISD required masks throughout the year and saw a lower positivity rate inside its schools than in the community at large.

We understand that this development may affect families' decisions regarding in-person learning. Families who are currently enrolled in the [District's virtual learning program](#) and wish to transition back to on-campus learning may do so by contacting their home campus registrar's office. Round Rock ISD's current [COVID-19 protocols](#) are designed with the guidance of local health agencies and in consideration of the current and developing public health climate. Round Rock ISD will reassess conditions frequently and adjust accordingly.

Los cubrebocas serán requeridos temporalmente en todas las escuelas e instalaciones de Round Rock ISD

ACTUALIZACIÓN: La Mesa Directiva aprobó actualizar el requisito de máscaras del Distrito durante su reunión convocada el 25 de agosto. Todos los estudiantes, maestros, miembros del personal y visitantes adultos, incluidos los Fideicomisarios, deben usar máscaras en los autobuses y dentro de los edificios

escolares cuando no se pueda mantener una distancia de seis pies. Los estudiantes y el personal tienen la opción de quitarse las máscaras mientras están sentados en las cafeterías y los comedores del personal y al aire libre. Las máscaras se pueden quitar para actividades durante las clases de atletismo, bellas artes y educación física si el entrenador, director o instructor lo considera apropiado. Las personas con circunstancias de salud o desarrollo pueden optar por no participar enviando documentación.

A partir del miércoles 18 de agosto, se requerirán máscaras temporalmente en todas las escuelas e instalaciones de Round Rock ISD, luego de la aprobación de la Junta de Fideicomisarios durante su [reunión convocada](#) el 16 de agosto.

El requisito expira el 17 de septiembre de 2021. La reunión mensual regular de la Junta está programada para el 16 de septiembre de 2021, y los Fideicomisarios podrían votar para extender el requisito en ese momento si las condiciones lo justifican.

Bajo el nuevo protocolo de máscaras del Distrito, todos los estudiantes, maestros, miembros del personal y visitantes adultos, incluidos los Fideicomisarios, deben usar máscaras en los autobuses y dentro de los edificios escolares cuando no se pueda mantener una distancia de seis pies. Los estudiantes y el personal tienen la opción de quitarse las máscaras mientras comen y beben y mientras están al aire libre. El requisito no es efectivo durante las clases de atletismo, bellas artes y educación física a menos que el entrenador, director o instructor lo considere apropiado.

"Mi máxima responsabilidad es la salud y el bienestar de nuestros estudiantes. Debemos examinar la ciencia, escuchar a los expertos y hacer lo correcto para protegerlos. Como han dicho otros superintendentes que han decidido requerir cubrebocas, si vamos a errar, quiero errar por el lado de la precaución", dijo el Dr. Hafedh Azaiez, Superintendente de Escuelas. "Conforme el ambiente de salud pública continúa cambiando rápidamente, debemos estar dispuestos a adaptarnos y tomar decisiones para proteger a nuestra comunidad, ya que sabemos que los cubrebocas son una herramienta esencial para reducir la propagación del COVID-19".

Las autoridades de salud locales en los condados de Travis y Williamson, y los [Centros para el Control y la Prevención de Enfermedades](#) (CDC-siglas en inglés), recomiendan que los estudiantes, el personal y los visitantes usen el cubrebocas en la escuela para mitigar la propagación actual del COVID-19 en la comunidad, sobre todo teniendo en cuenta el aumento de la transmisión de la enfermedad y la tasa de infección causado principalmente por la variante "Delta", más transmisible. Además, la [Academia Estadounidense de Pediatría](#) recomienda que todos los mayores de dos años usen cubrebocas en las escuelas, independientemente de su estado de vacunación. Actualmente, los funcionarios de salud locales y federales insisten que los cubrebocas son la estrategia más efectiva para reducir las posibilidades de transmisión y frenar la propagación del virus.

Mientras que el gobernador Greg Abbott emitió la Orden Ejecutiva [GA No. 36](#) a principios de este año, que prohibía a las escuelas obligar el uso de cubrebocas, varios distritos en todo el estado han decidido requerir el cubrebocas y los desafíos legales a la orden del gobernador están en curso. El año pasado, Round Rock ISD requirió cubrebocas durante todo el año escolar y vio una tasa de casos positivos, más baja dentro de sus escuelas que en la comunidad en general.

Entendemos que este desarrollo puede afectar las decisiones de las familias con respecto al aprendizaje en persona. Las familias que actualmente están inscritas en el [Programa de Aprendizaje Virtual del Distrito](#) y desean hacer la transición de regreso al aprendizaje en la escuela pueden hacerlo comunicándose con la oficina de registro de su escuela de origen.

Los [protocolos actuales del COVID-19](#) de Round Rock ISD están diseñados con la orientación de las agencias de salud locales y teniendo en cuenta el ambiente de salud pública actual y en desarrollo. Round Rock ISD reevaluará las condiciones con frecuencia y se ajustará en consecuencia.

SHARE:



[Dr. Zac Oldham named Area Superintendent of Westwood Learning Community](#)



[Virtual Learning Program first day moved to Aug. 25](#)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

EXHIBIT C

August 17, 2021

VIA EMAIL

Dr. Hafedh Azaiez
Superintendent, Round Rock ISD
1311 Round Rock Ave.
Round Rock, TX 75081
superintendent_rrisd@roundrockisd.org

Dear Dr. Azaiez:

You recently enacted a local policy mandating that students and faculty wear face masks at schools in your district. Your actions exceeded your authority as restricted by Governor Abbott's Executive Order GA-38, which states that "[n]o governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering[.]"¹

The Governor's executive orders "have the force and effect of law" and supersede local regulations.² Courts have previously agreed.³ My office has taken legal action in multiple cases across the state to defend the rule of law by ensuring the Governor's valid and enforceable orders are followed.

You are advised that two days ago the Texas Supreme Court issued two orders staying temporary restraining orders issued by trial courts in Dallas and Bexar counties that sought to enjoin the Governor from asserting his authority to preempt local face-mask mandates.⁴ These orders are a preview of what is to come. We are confident that any attempt to obtain a similar

¹ See Executive Order GA-38, issued July 29, 2021, available at: https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf.

² See, e.g., Tex. Gov't Code §§ 418.011–.012.

³ See, e.g., *State v. El Paso Cty.*, 618 S.W.3d 812 (Tex. App.—El Paso 2020, no pet.).

⁴ <https://www.txcourts.gov/supreme/orders-opinions/2021/august/august-15-2021.aspx>

temporary restraining order in your jurisdiction will inevitably be stayed by the Texas Supreme Court and that any subsequent relief ordered by a trial court will ultimately be reversed.⁵

The Supreme Court has spoken. Local orders purporting to enjoin the Governor's authority may not be enforced while the Court considers the underlying merits of these cases. My office will pursue further legal action, including any available injunctive relief, costs and attorney's fees, penalties, and sanctions—including contempt of court—available at law against any local jurisdiction and its employees that persist in enforcing local mask mandates in violation of GA-38 and any applicable court order.

I request your acknowledgement by 5 p.m. Tuesday, August 17, that in light of the Court's rulings, you will rescind your local policy requiring masks in public schools or, alternatively, not enforce it pending the Supreme Court's disposition of the cases before it involving this issue. Otherwise, you will face legal action taken by my office to enforce the Governor's order and protect the rule of law.

For Texas,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, slightly stylized font.

KEN PAXTON
Attorney General of Texas

⁵ *Veigel v. Tex. Boll Weevil Eradication Foundation*, 549 S.W.3d 193, 202–03 (Tex. App.—Austin 2018, no pet.) (acknowledging that lower courts “are not free to mold Texas law as we see fit but must instead follow the precedents of the Texas Supreme Court”).

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

No. 21-0687

IN RE GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE
STATE OF TEXAS

ON PETITION FOR WRIT OF MANDAMUS

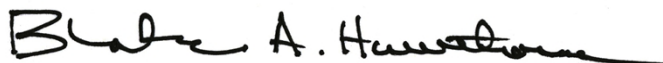
ORDERED:

1. Relator's emergency motion for temporary relief, filed August 13, 2021, is granted. The order on Plaintiffs' Verified Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Declaratory Judgment dated August 10, 2021, in Cause No. 2021CI16133, styled *City of San Antonio and Bexar County v. Greg Abbott, in his official capacity as Governor of Texas, in the 45th District Court of Bexar County, Texas*, is stayed pending further order of this Court, except to the extent that it sets a hearing on plaintiffs' request for a temporary injunction.

2. The trial court's temporary restraining order alters the status quo preceding this controversy, and its effect is therefore stayed pending that court's hearing and decision on plaintiffs' request for a temporary injunction. *See In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

3. The petition for writ of mandamus remains pending before this Court.

Done at the City of Austin, this Sunday, August 15, 2021.



BLAKE A. HAWTHORNE, CLERK
SUPREME COURT OF TEXAS

BY CLAUDIA JENKS, CHIEF DEPUTY CLERK

EXHIBIT E

IN THE SUPREME COURT OF TEXAS

No. 21-0686

IN RE GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE
STATE OF TEXAS

ON PETITION FOR WRIT OF MANDAMUS

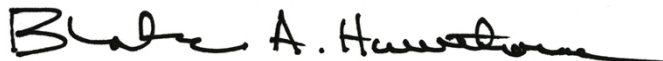
ORDERED:

1. Relator's emergency motion for temporary relief, filed August 13, 2021, is granted. The Temporary Restraining Order, dated August 10, 2021, in Cause No. DC-21-10101, styled *Clay Jenkins, in his Official Capacity v. Greg Abbott, in his Official Capacity as Governor of the State of Texas*, in the 116th District Court of Dallas County, Texas, is stayed pending further order of this Court, except to the extent that it sets a hearing on plaintiffs' request for a temporary injunction.

2. The trial court's temporary restraining order alters the status quo preceding this controversy, and its effect is therefore stayed pending that court's hearing and decision on plaintiffs' request for a temporary injunction. *See In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

3. The petition for writ of mandamus remains pending before this Court.

Done at the City of Austin, this Sunday, August 15, 2021.



BLAKE A. HAWTHORNE, CLERK
SUPREME COURT OF TEXAS

BY CLAUDIA JENKS, CHIEF DEPUTY CLERK

EXHIBIT F

IN THE SUPREME COURT OF TEXAS

No. 21-0720

IN RE GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE
STATE OF TEXAS

ON PETITION FOR WRIT OF MANDAMUS

ORDERED:

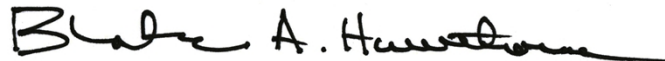
1. Relator's emergency motion for temporary relief, filed August 23, 2021, is granted. The order on Appellees' Rule 29.3 Emergency Motion for Temporary Order to Maintain Temporary Injunction in Effect Pending Disposition of Interlocutory Appeal, filed August 17, 2021, in Cause No. 04-21-00342-CV, styled *Greg Abbott, in his official capacity as Governor of Texas v. City of San Antonio and County of Bexar*, in the Court of Appeals for the Fourth Judicial District, dated August 19, 2021, is stayed pending further order of this Court.

2. As we previously held in staying the trial court's temporary restraining order in the underlying case, the court of appeals' order alters the status quo preceding this controversy, and its effect is therefore stayed pending that court's decision on the merits of the appeal. *See In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). This case, and others like it, are not about whether people should wear masks or whether the government should make them do it. Rather, these cases ask courts to determine which government officials have the legal authority to decide what the government's position on such questions will be. The status quo, for many months, has been gubernatorial oversight of such decisions at both the state and local levels. That status quo should remain in place while the court of appeals, and potentially this Court, examine the parties' merits arguments to determine whether plaintiffs have demonstrated a probable right to the relief sought.

3. The petition for writ of mandamus remains pending before this Court.

FILE COPY

Done at the City of Austin, this Thursday, August 26, 2021.

A handwritten signature in black ink, reading "Blake A. Hawthorne". The signature is fluid and cursive, with a long horizontal stroke at the end.

BLAKE A. HAWTHORNE, CLERK
SUPREME COURT OF TEXAS

BY CLAUDIA JENKS, CHIEF DEPUTY CLERK

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Bonnie Chester on behalf of Kimberly Gdula
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Status as of 9/10/2021 8:12 AM CST

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JUDICIAL DISTRICT

R. 000038

prevent the irreparable harm of the continued violation of state law absent injunctive relief.

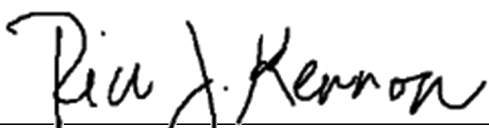
It is therefore ORDERED that the State of Texas's Application for a Temporary Restraining Order is GRANTED.

It is FURTHER ORDERED that Defendants are prohibited from enforcing a facemask mandate for as long as GA-38 (or a future executive order containing the same prohibitions) remain in effect.

It is FURTHER ORDERED that the State of Texas is exempt from the requirement to post bond.

It is FURTHER ORDERED a hearing on the State of Texas's application for temporary injunction is set for the 28 ^{September} day of _____ 2021 at 9 a.m.. The purpose of this hearing shall be to determine whether the Temporary Restraining Order should be made a temporary injunction pending a full trial on the merits.

Signed this 14 ^{September} day of _____, 2021 at 11:17 a.m.
9/14/2021 11:17:00 AM



JUDGE PRESIDING

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Bonnie Chester		bonnie.chester@oag.texas.gov	9/9/2021 8:51:23 PM	SENT

CAUSE NO. 21-1471-C368

STATE OF TEXAS,
Plaintiff,

v.

ROUND ROCK INDEPENDENT SCHOOL
DISTRICT, BOARD OF TRUSTEES OF ROUND
ROCK INDEPENDENT SCHOOL DISTRICT, ET
AL.

Defendants.

§ IN THE DISTRICT COURT
§
§
§
§
§
§ WILLIAMSON COUNTY, TEXAS
§
§
§
§

BRIEF FOR AMICUS CURIAE DISABILITY RIGHTS TEXAS

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DISABILITY RIGHTS TEXAS

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INDEX OF AUTHORITIES

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Cases	
<i>In re Abbott</i> , No. 21-0720, Order (Tex. Aug. 26, 2021)	25
<i>Astralis Condo. Ass’n v. Sec’y, U.S. Dep’t of Hous. & Urb. Dev.</i> , 620 F.3d 62 (1st Cir. 2010)	15
<i>G.S. by and through Schwaigert v. Lee</i> , No. 21-cv-2552, 2021 WL 4057812 (W.D. TN. Sept. 3, 2021)	4, 14
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	15
<i>The Arc of Iowa v. Reynolds</i> , No. 21-cv-264, 2021 U.S. Dist. LEXIS 172685 (S.D. Iowa Sept. 13, 2021)	4, 14, 15
Statutes	
29 U.S.C. § 701 <i>et seq.</i>	20
29 U.S.C. § 794(e)	1
42 U.S.C. §§ 1081 <i>et seq.</i>	1
42 U.S.C. §§ 6001 <i>et seq.</i>	1
42 U.S.C. § 6042(2)	1
42 U.S.C. § 10805(a)(1)	1
42 U.S.C. § 12132	20
ARPA § 2001(e)(2)(Q)	15
ARPA § 2001(i)	15
Iowa Code § 280.31	14, 15
Pub. L. No. 117-2	15
Other Authorities	
28 C.F.R. § 35.130(a)	22

28 C.F.R. § 35.130(b)(1).....	22
28 C.F.R. § 35.130(b)(7)(i).....	22
28 C.F.R. § 35.130(d)	22
28 C.F.R. § 35.150(a).....	22
86 Fed. Reg. 21195 (Apr. 22, 2021)	15, 16
86 Fed. Reg. 21200 (Apr. 22, 2021)	16
The ABC Science Collaborative, <i>Zimmerman, Benjamin Urge Mask Wearing in Press Conference</i> , https://abcsciencecollaborative.org/zimmerman-benjamin-urge-mask-wearing-in-press-conference/	13
American Academy of Pediatrics, <i>COVID-19 Guidance for Safe Schools</i> , https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/	18
Anna Caplan, <i>Fort Worth ISD will require masks in schools</i> , Dall. Morning News, Aug. 11, 2021, https://www.dallasnews.com/news/2021/08/11/letter-from-125-cook-childrens-physicians-prompts-fwisd-to-mandate-masks-for-school-year/	13
Anne Masi, et al., <i>Impact of the COVID-19 pandemic on the well-being of children with neurodevelopmental disabilities and their parents</i> , J. of Pediatric and Child Health (2021), https://onlinelibrary.wiley.com/doi/10.1111/jpc.15285	20
Centers for Disease Control, <i>COVID-19: People with Certain Medical Conditions</i> , May 13, 2021, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html	17
Centers for Disease Control, <i>Delta Variant: What We Know About the Science</i> , https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html	8
Centers for Disease Control, <i>Guidance for COVID-19 Prevention in K-12 Schools</i> , https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html	19

Centers for Disease Control, <i>Guidance for COVID-19 Prevention in K-12 Schools</i> , Aug. 5, 2021, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html	10
Centers for Disease Control, <i>Guidance for COVID-19 Prevention in K-12 Schools</i> , Aug. 5, 2021, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html	13
Christina Maxouris, <i>More than 470 Covid Cases and 1,000 Quarantined After the First Week of School in a Florida County</i> , CNN, https://www.cbs46.com/more-than-470-covid-cases-and-1-000-quarantined-after-the-first-week-of-school/article_f2cf5110-74d5-5cc4-aab4-4a8c8118b7da.html (last updated Aug. 13, 2021)	11, 12
Colleen Deguzman, <i>Texas has seen nearly 9,000 COVID-19 deaths since February. All but 43 were unvaccinated people</i> , Tex. Trib., July 23, 2021, https://www.texastribune.org/2021/07/21/coronavirus-texas-vaccinated-deaths/	9
Hannah Natanson, Valerie Strauss, Katherin Frey, “How America failed students with disabilities during the pandemic,” Washington Post, May 20, 2021, https://www.washingtonpost.com/education/2021/05/20/students-disabilities-virtual-learning-failure/	19
https://downloads.aap.org/DOFA/AAP%20Letter%20to%20FDA%20on%20Timeline%20for%20Authorization%20of%20COVID-19%20Vaccine%20for%20Children_08_05_21.pdf	10
https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf (July 29, 2021)	22
https://today.tamu.edu/2020/06/12/texas-am-study-face-masks-critical-in-preventing-spread-of-covid-19/	21
Julie B. Eisengart, et al., <i>Issues of COVID-19-Related Distance Learning for Children with Neuronopathic Mucopolysaccharidoses</i> , Molecular Genetics and Metabolism (2021)	25
Katherine J. Wu, <i>Delta Is Bad News for Kids</i> , The Atlantic, Aug. 10, 2021, https://www.theatlantic.com/health/archive/2021/08/delta-variant-covid-children/619712/	11
Kathy Katella, <i>Five Things to Know about the Delta Variant</i> , Yale Medicine, Aug. 9, 2021, https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid	10

Keith Randall, Texas A&M Study: Face Masks Critical In Preventing Spread Of COVID-19, Texas A&M Today, June 12, 2020	21
Lauren Girgis, Charles Scudder and Allie Morris, <i>In North Texas, intensive care bed space is running out. Only 2 pediatric ICU spots remain in region</i> , Dall. Morning News, Aug. 10, 2021, https://www.dallasnews.com/news/public-health/2021/08/10/in-north-texas-intensive-care-bed-space-is-running-out-only-2-pediatric-icu-spots-remain-in-region/	9
Percentage of ever having asthma for children under age 18 years, United States, 2019, Nat'l Ctr. for Health Stat., Aug. 14, 2021, https://wwwn.cdc.gov/NHISDataQueryTool/SHS_child/index.html	18
Reese Oxner, <i>Dozens of Texas Hospitals are out of ICU beds as COVID-19 cases again overwhelm the state's capacity</i> , Tex. Trib., Aug. 10, 2021, https://www.texastribune.org/2021/08/10/coronavirus-texas-hospitals-icu-beds/	8, 9
SBG San Antonio, Gov. Abbott: 'Masks are our best option' against COVID-19 spike, June 24, 2020, https://news4sanantonio.com/news/local/gov-abbott-masks-are-our-best-option-against-covid-19-spike	21
Tex. Pediatric Soc'y, <i>Physicians Encourage Masking and Vaccination of Students</i> , July 28, 2021, https://txpeds.org/physicians-encourage-masking-and-vaccination-students	12
Tori B. Powell, <i>No pediatric ICU beds left in Dallas amid COVID surge, county judge says</i> , CBS News (Aug. 13, 2021), https://www.cbsnews.com/news/dallas-hospitals-pediatric-icu-beds-covid	10
Tracking Coronavirus in Texas: Latest Map and Case Count, N.Y. Times, https://www.nytimes.com/interactive/2021/us/texas-covid-cases.html (last updated Sept. 13, 2021)	8
Tracking Coronavirus in Texas: Latest Map and Case Count, N.Y. Times (Aug. 14, 2021)	9
U.S. Dep't of Educ., <i>The Disparate Impacts of COVID-19 on America's Students</i> , June 9, 2021, iv, https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf	19

STATEMENT OF INTEREST

Amicus curiae Disability Rights Texas (DRTX) is a nonprofit organization mandated to protect the legal rights of people with disabilities by the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001 *et seq.*, the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 1081 *et seq.*, and the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act of 1973, 29 U.S.C. § 794(e). DRTX is the designated “protection and advocacy” system for the State of Texas. In accordance with its federal mandate, DRTX has the authority to, among other things, pursue administrative, legal, and other appropriate remedies to protect the rights of persons with disabilities. 42 U.S.C. § 6042(2); 42 U.S.C. § 10805(a)(1). A significant portion of DRTX’s work is representing students with disabilities and their families throughout the state of Texas to secure appropriate education services from public schools. DRTX is interested in this matter because of the implications that the Court’s decision will have for the ability for certain students with disabilities to safely attend school in-person without serious risk to their health and safety.

STATEMENT OF COMPLIANCE WITH TEX. R. APP. P. 11(C)

No fee was paid nor will be paid for preparing this brief by any source.

To the Honorable District Court:

INTRODUCTION

The State of Texas, on the Governor's behalf, has filed a Verified Original Petition and Applications for Temporary Restraining Order and Temporary Injunctive Relief seeking to enforce GA-38, the Governor's Executive Order purporting to bar governmental entities such as the Defendant School District from requiring its staff and students to wear masks. But the State has failed to inform this Court of two important facts. First, there is a previously filed, and pending, federal lawsuit brought by students with disabilities alleging that GA-38 violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act and is preempted by the American Rescue Plan Act of 2021¹ Second, the Governor, the Texas Attorney General, and the Texas Education Agency have represented to the federal court that they do not, *and cannot*, enforce GA-38. The federal court is hearing Plaintiffs' Motion for Temporary Restraining Order on Wednesday, September 15. Federal courts in Tennessee and Iowa have recently enjoined state executive orders similar to GA-38 that were prohibiting local school districts from implementing mask mandates as needed to protect their staff and students with disabilities.²

Recognizing that GA-38 is preempted by federal law, this Court should allow local officials to make evidence-based decisions tailored to the needs of their constituents—including the

¹ The pending federal court action is *E.T., et al. v. Governor Greg Abbott, in his official capacity as Governor of Texas, Mike Morath, in his official capacity as the Commissioner of the Texas Education Agency, the Texas Education Agency, and Attorney General Kenneth Paxton, in his official capacity as Attorney General of Texas*; No. 1:21-CV-00717-LY (W.D. Tex).

² See *G.S. by and through Schwaigert v. Lee*, No. 21-cv-2552, 2021 WL 4057812 (W.D. TN. Sept. 3, 2021) and *The Arc of Iowa v. Reynolds*, No. 21-cv-264, 2021 U.S. Dist. LEXIS 172685 (S.D. Iowa Sept. 13, 2021).

medically-fragile children with disabilities represented by Amicus here—and deny the State’s request for relief.

SUMMARY OF ARGUMENT

Amicus Disability Rights Texas writes to emphasize the impact of GA-38 on children with disabilities throughout the state of Texas, the conflicting representations made by the State in state and federal court, and that GA-38 violates and is preempted by federal law.

It is broadly accepted that students benefit from in-person learning and that it must be the norm for the current school year. The pandemic has already caused untold disruption to students across the state, but for students with disabilities, the lack of safe in-person instruction has resulted in significant setbacks in educational development, and it has limited access to related aids and services needed to support these students’ academic progress and prevent regression.

Governor Abbott’s attempt to bar local authorities from adopting mask requirements to protect their students and staff in line with current CDC guidance puts in place another barrier for students with disabilities—in particular those students with disabilities that place them at a higher risk of hospitalization, severe illness, or death should they contract COVID-19.

As explained herein, federal law requires that local school districts have the discretion to adopt policies in line with CDC guidance and with the needs of their communities, which will fulfill their obligations under the ADA and the Rehabilitation Act and allow these most vulnerable children to safely return to school in-person this year without serious risk to their health and safety.

ARGUMENT

I. In a Pending Federal Action Brought by Students with Disabilities Against the Governor, Attorney General, and the TEA, the State is Asserting that the Governor, the Attorney General, and the TEA Cannot Enforce GA-38.

In its Petition and Application for Injunctive Relief, the State, on behalf of the Governor, asks this Court to enforce GA-38. The Petition includes a letter from the Texas Attorney General

to the Defendant School District stating that the “Governor’s executive orders ‘have the force and effect of law,’” and that if District’s masking policy is not rescinded, “you will face legal action taken by my office to enforce the Governor’s order”

However, in a federal action brought by 14 students with disabilities against the Governor, Attorney General Paxton, and the Texas Education Agency (and its Commissioner), the State is telling a completely different story. The State, in its briefing, has expressly told the federal court that “Governor Abbott does not enforce GA-38,”³ that the “Attorney General does not enforce GA-38,”⁴ and that neither the TEA Commissioner nor TEA can enforce GA-38.⁵ Enforcement of GA-38, the State has represented to the federal court, is the exclusive province of local district attorneys through “criminal prosecution of the \$1,000 fine.”⁶

The State repeated these assertions in its recent motion to dismiss the federal action, stating that:

- Put simply, an order enjoining Attorney General Paxton from enforcing GA-38 will not redress Plaintiffs’ injuries as he does not enforce GA-38 in the first place.⁷
- Like Attorney General Paxton, Governor Abbott also does not enforce emergency executive orders.⁸

In sum, the State is asking this Court to effectuate its enforcement of GA-38, while at the very same time it is asking a federal court to dismiss the case against its officials by claiming that the GA-38 *cannot* be enforced except by local district attorneys. The federal court in Austin is holding a hearing on September 15, 2021 on Plaintiffs’ motion for a temporary restraining order enjoining

³ See Defendant’s Brief Addressing Propriety of Current Parties at 3, attached as Ex. A.

⁴ *Id.* at 4.

⁵ *Id.* at 6.

⁶ *Id.* at 4.

⁷ See Defendant’s Motion to Dismiss at 16 (fn. omitted), attached as Ex. B.

⁸ *Id.* at 20 (fn. omitted).

the Governor, Attorney General Paxton, and TEA and its Commissioner from enforcing GA-38. A bench trial on the merits is set for October 6, 2021.

II. School-Aged Children Face Increased Risks from the COVID-19 Delta Variant

After COVID-19 hospitalizations initially peaked in January, the number of deaths, hospitalizations, and infections in Texas began declining once vaccines became available. Things drastically changed in July with the arrival of the highly contagious and virulent COVID-19 Delta variant.⁹ The number of reported cases, hospitalizations, and deaths due to COVID-19 all increased sharply.¹⁰ The current daily average of COVID-19 cases in Texas is now 18,908, a 15% increase in positive cases over the past 14 days, and the daily average of hospitalizations is now at 14,205.¹¹ The surging hospitalization rate has left many hospitals in Texas out of ICU beds, especially those dedicated to pediatric care.¹² For example, a lack of pediatric ICU beds has forced young patients to be transported across the state or to out-of-state hospitals to receive care.¹³

⁹ Centers for Disease Control, *Delta Variant: What We Know About the Science*, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (noting that the Delta variant is “more than 2x as contagious as previous variants” and studies indicated that “patients infected with the Delta variant were more likely to be hospitalized”).

¹⁰ *Tracking Coronavirus in Texas: Latest Map and Case Count*, N.Y. Times, <https://www.nytimes.com/interactive/2021/us/texas-covid-cases.html> (last updated Sept. 13, 2021).

¹¹ *Id.*

¹² Reese Oxner, *Dozens of Texas Hospitals are out of ICU beds as COVID-19 cases again overwhelm the state’s capacity*, Tex. Trib., Aug. 10, 2021, <https://www.texastribune.org/2021/08/10/coronavirus-texas-hospitals-icu-beds/>.

¹³ *Id.* For example, as of August 10, 2021, only two pediatric beds were available for all of North Texas. Lauren Girgis, Charles Scudder and Allie Morris, *In North Texas, intensive care bed space is running out. Only 2 pediatric ICU spots remain in region*, Dall. Morning News, Aug. 10, 2021, <https://www.dallasnews.com/news/public-health/2021/08/10/in-north-texas->

These developments are particularly troubling for students and school districts because the Delta variant and ongoing exponential growth in cases is threatening the school year. While COVID-19 vaccines are widely available, Texas schoolchildren under the age of 12 cannot currently be vaccinated. Since February, 99.5% of COVID-19 deaths have been people who were unvaccinated.¹⁴ While less than 50% of the Texas population is fully vaccinated, almost all students ages 5 to 12 years remain at significant risk until they are eligible to receive a vaccine.¹⁵

While full vaccination is the “leading public health prevention strategy to end the COVID-19 pandemic,” every school district in this state “serve[s] children under the age of 12 who are not eligible for vaccination at this time.”¹⁶

[intensive-care-bed-space-is-running-out-only-2-pediatric-icu-spots-remain-in-region/](#).

¹⁴ Colleen Deguzman, *Texas has seen nearly 9,000 COVID-19 deaths since February. All but 43 were unvaccinated people*, Tex. Trib., July 23, 2021, <https://www.texastribune.org/2021/07/21/coronavirus-texas-vaccinated-deaths/> (reporting on statistics provided by the Texas Department of State Health Services).

¹⁵ *Id.* (“As of Aug. 12, about 44.8% of Texas’ 29 million people have been fully vaccinated — 83% of Texans are age 12 and older and thus eligible for a vaccine.”); see also *Tracking Coronavirus in Texas: Latest Map and Case Count*, N.Y. Times (Aug. 14, 2021), <https://www.nytimes.com/interactive/2021/us/texas-covid-cases.html> (showing that 45% of Texans are fully vaccinated and 54% have received at least one dose). And yesterday “there were no pediatric intensive care unit beds available in Dallas” and the 19 surrounding counties. Tori B. Powell, *No pediatric ICU beds left in Dallas amid COVID surge, county judge says*, CBS News (Aug. 13, 2021), <https://www.cbsnews.com/news/dallas-hospitals-pediatric-icu-beds-covid>.

¹⁶ Centers for Disease Control, *Guidance for COVID-19 Prevention in K-12 Schools*, Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

Data also unfortunately confirms that school-aged children have been infected at higher rates with the Delta variant, especially among those children who are unvaccinated.¹⁷ According to the American Academy of Pediatrics, “the Delta variant has created a new and pressing risk to children and adolescents across this country.”¹⁸ Pediatric cases of COVID-19 have been “skyrocketing alongside cases among unimmunized adults; child hospitalizations have now reached an all-time pandemic high.”¹⁹ For the week ending July 29, 2021, “nearly 72,000 new coronavirus cases were reported in kids—almost a fifth of all total known infections in the U.S., and a rough doubling of the previous week’s stats.”²⁰ The next week the number of new coronavirus cases in children jumped to almost 94,000.²¹ As the American Academy of Pediatrics explained: “The higher proportion of cases in this population means this age group could be contributing in driving continued spread of COVID-19. Sadly, over 350 children have died of COVID since the start of the pandemic and millions of children have been negatively impacted by missed schooling, social isolation, and in too many cases, the death of parents and other

¹⁷ Kathy Katella, *Five Things to Know about the Delta Variant*, Yale Medicine, Aug. 9, 2021, <https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid> (noting that a recent study “showed that children and adults under 50 were 2.5 times more likely to become infected with Delta”).

¹⁸ Letter from Leo Savior Beers, President of AAP, to Dr. Janet Woodcock, Acting Comm’r of the FDA, August 5, 2021, https://downloads.aap.org/DOFA/AAP%20Letter%20to%20FDA%20on%20Timeline%20for%20Authorization%20of%20COVID-19%20Vaccine%20for%20Children_08_05_21.pdf.

¹⁹ Katherine J. Wu, *Delta Is Bad News for Kids*, The Atlantic, Aug. 10, 2021, <https://www.theatlantic.com/health/archive/2021/08/delta-variant-covid-children/619712/>.

²⁰ *Id.*

²¹ *Id.*

caregivers.”²² For example, only days into the start of this school year without a mask requirement in place, Florida’s Brevard Public Schools reported more than 470 COVID-19 cases among students and teachers and roughly 1,060 people in quarantine.²³

III. The CDC and Medical Experts Have Recommended Universal Indoor Masking to Help Schools Safely Return To In-Person Learning.

Due to the recent surge caused by the Delta variant and the unavailability of vaccines for children under 12, medical experts recommend that masks be worn at schools to prevent the further spread of COVID-19 and help schools safely return to in-person learning. Specifically, the CDC currently “recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.”²⁴ In addition, the Texas Medical Association, Texas Pediatric Society, and Texas Public Health Coalition have all called for universal masking in schools: “Let’s face it; if we don’t take action, the more infectious COVID-19 delta variant will spread among students when they gather together in schools. We urge use of every tool in our toolkit to protect our children and their families from COVID-19.”²⁵ And 125

²² AAP President’s Letter, *supra* note 9.

²³ Christina Maxouris, *More than 470 Covid Cases and 1,000 Quarantined After the First Week of School in a Florida County*, CNN, https://www.cbs46.com/more-than-470-covid-cases-and-1-000-quarantined-after-the-first-week-of-school/article_f2cf5110-74d5-5cc4-aab4-4a8c8118b7da.html (last updated Aug. 13, 2021).

²⁴ *Id.*

²⁵ Tex. Pediatric Soc’y, *Physicians Encourage Masking and Vaccination of Students*, July 28, 2021, <https://txpeds.org/physicians-encourage-masking-and-vaccination-students>.

physicians from Cook Children’s Medical Center in Fort Worth wrote to Fort Worth ISD asking for a mask mandate, noting the increase in COVID-19 infections and hospitalizations.²⁶

The conclusion of these experts is that masking works. Recent studies agree. The ABC Science Collaborative, led by top physicians on the staff of Duke University, studied data from 100 school districts in North Carolina, and found that “[w]hen masking is in place, COVID-19 transmission in schools is low.”²⁷ And, as stated by the CDC, “when teachers, staff, and students consistently and correctly wear a mask, they protect others as well as themselves.”²⁸ Most critically, local school districts and communities should be allowed to make the decision that masks are needed based on local conditions and the populations they serve.

IV. Governor Abbott’s Executive Order Conflicts With Federal Law Mandating That Local School Districts Have the Authority To Adopt Health and Safety Policies Including Mask Requirements

Governor Abbott’s Executive Order impermissibly interferes with local school districts’ authority to adopt policies, including mask requirements, to protect students and educators as they develop plans for safe return to in-person instruction as required under federal law.

First, GA-38 is preempted by the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Two federal courts, one in Tennessee and one on Iowa, have recently issued temporary restraining orders against the enforcement of similar

²⁶ Anna Caplan, *Fort Worth ISD will require masks in schools*, Dall. Morning News, Aug. 11, 2021, <https://www.dallasnews.com/news/2021/08/11/letter-from-125-cook-childrens-physicians-prompts-fwisd-to-mandate-masks-for-school-year/>.

²⁷ The ABC Science Collaborative, *Zimmerman, Benjamin Urge Mask Wearing in Press Conference*, <https://abcsciencecollaborative.org/zimmerman-benjamin-urge-mask-wearing-in-press-conference/>.

²⁸ Centers for Disease Control, *Guidance for COVID-19 Prevention in K-12 Schools*, Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

executive orders restricting schools' ability to implement mask requirements.. In both cases, the federal courts found that the executive orders were in conflict with provisions of the ADA and 504.²⁹ As the federal court in Iowa explained,

The Court concludes Iowa Code section 280.31 seems to conflict with the ADA and section 504 of the Rehabilitation Act because it excludes disabled children from participating in and denies them the benefits of public schools' programs, services, and activities to which they are entitled. Thus, section 280.31 appears to "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines [v. Davidowitz]*, 312 U.S. [52], at 67. Defendants are "duty bound not to enforce a statutory provision if doing so would either cause or perpetrate unlawful discrimination." *Astralis Condo. Ass'n v. Sec'y, U.S. Dep't of Hous. & Urb. Dev.*, 620 F.3d 62, 69 (1st Cir. 2010).³⁰

In addition to being preempted by the ADA and Section 504, GA-38 is also preempted by the American Rescue Plan Act of 2021 (ARPA) and the Department of Education's implementing requirements.³¹ Under section 2001(i) of the ARPA, local school districts in Texas have been allocated billions of dollars in Elementary and Secondary School Emergency Relief (ESSER) funding so they can adopt plans for a safe return to in-person instruction. Section 2001(e)(2)(Q) of the ARPA explicitly gives local school districts the authority to use these ARPA ESSER funds for "developing strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the Centers for Disease Control and Prevention for the reopening and operation of school facilities to effectively maintain the health

²⁹ See *G.S. by and through Schwaigert v. Lee*, No. 21-cv-2552, 2021 WL 4057812 at *7-8 (W.D. TN. Sept. 3, 2021) (attached as Ex. __) (enjoining enforcement of governor's executive order that allowed parents to opt out from school mask requirements) and *Arc of Iowa v. Reynolds*, No. 4:21-cv-00264, 2021 U.S. Dist. LEXIS 172685 (S.D. Iowa Sep. 13, 2021) (attached as Ex. __) (enjoining enforcement of governor's executive order prohibiting school mask requirements).

³⁰ *Arc of Iowa v. Reynolds*, at 27.

³¹ Pub. L. No. 117-2; 86 Fed. Reg. 21195 (Apr. 22, 2021).

and safety of students, educators, and other staff.” As discussed above, the CDC’s guidance specifically recommends universal indoor masking in all K-12 schools.

Furthermore, interim final requirements adopted by the U.S. Department of Education specifically require each local school district to adopt a plan for safe return to in-person instruction that describes “the extent to which it has adopted policies, and a description of any such policies, on each of the following safety recommendations established by the CDC...”, specifically including “universal and correct wearing of masks.”³² In other words, federal law as interpreted by the Department of Education mandates that local school districts – and not the state – have the authority to decide whether and to what extent they will adopt mask policies consistent with CDC guidance. Governor Abbott’s Executive Order impermissibly conflicts with and is preempted by this federal law.

Because GA-38 is in conflict with the ADA, Section 504, and the ARPA, this Court should reject the State’s attempt to deny children with disabilities of their rights to be free from discrimination and have an equal opportunity to participate in and derive the benefits of school programs, services, and activities.

V. Students with Disabilities are Particularly at Risk

School-aged children with certain disabilities, including a range of underlying medical conditions, face a higher rate of severe illness from COVID-19 as compared to other children without those underlying medical conditions. According to the CDC, “children with medical complexity, with genetic, neurologic, metabolic conditions, or with congenital heart disease can

³² 86 Fed. Reg. 21195, 21200 (Apr. 22, 2021).

be at increased risk for severe illness from COVID-19.”³³ And as with adults that face increased risks, “children with obesity, diabetes, asthma or chronic lung disease, sickle cell disease, or immunosuppression can also be at increased risk for severe illness from COVID-19.”³⁴ Texas school districts regularly serve students with these exact disabilities—moderate to severe asthma, chronic lung and heart conditions, cerebral palsy, Down syndrome, and weakened immune systems are common. Asthma alone impacts ten percent of school-age children.³⁵

VI. Students with Disabilities Need In-person Schooling

The COVID-19 pandemic has already dramatically affected students with disabilities, beginning with the closure of the public school system in the spring of 2020. While school districts across Texas have been on the front lines of this pandemic, many students lost critical instruction and services, continuing throughout the 2020-21 school year.

The American Academy of Pediatrics has explained that “remote learning highlighted inequities in education, was detrimental to the educational attainment of students of all ages, and exacerbated the mental health crisis among children and adolescents.”³⁶ That detrimental impact has been especially dramatic for students with disabilities. As detailed by the Department of Education, COVID-19 has significantly disrupted the education and related aids and services

³³ Centers for Disease Control, *COVID-19: People with Certain Medical Conditions*, May 13, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

³⁴ *Id.*

³⁵ *Percentage of ever having asthma for children under age 18 years, United States, 2019*, Nat’l Ctr. for Health Stat., Aug. 14, 2021, https://wwwn.cdc.gov/NHISDataQueryTool/SHS_child/index.html.

³⁶ American Academy of Pediatrics, *COVID-19 Guidance for Safe Schools*, <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/> (last updated July 18, 2021).

needed to support their academic progress and prevent regression.”³⁷ Students with disabilities not only lost critical in-class instruction, they lost services such as speech and occupational therapy, as well behavioral support and counseling. Many parents have reported regression.³⁸ And there is evidence that the disruption in services and instruction “may be exacerbating longstanding disability-based disparities in academic achievement.”³⁹

One thing is clear: “Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority.”⁴⁰ Moreover, students with disabilities need in-person schooling more than any other student group, but these children must be able to receive instruction and services safely.⁴¹ As many of these students have underlying health conditions and are at high risk for illness and even death due to COVID-19, local counties and school district should not be prevented from taking measures designed to protect their most vulnerable children and allow those students to safely return to school this year. By blocking those safety measures, the effect of Governor Abbott’s Executive Order is to place an unlawful barrier for students with disabilities that effectively excludes them from participation in the benefits of in-person schooling,

³⁷ U.S. Dep’t of Educ., *The Disparate Impacts of COVID-19 on America’s Students*, June 9, 2021, iv, <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

³⁸ Hannah Natanson, Valerie Strauss, Katherin Frey, “How America failed students with disabilities during the pandemic,” Washington Post, May 20, 2021, <https://www.washingtonpost.com/education/2021/05/20/students-disabilities-virtual-learning-failure/>.

³⁹ *Id.*

⁴⁰ Centers for Disease Control, *Guidance for COVID-19 Prevention in K-12 Schools*, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last updated Aug. 5, 2021).

⁴¹ Anne Masi, et al., *Impact of the COVID-19 pandemic on the well-being of children with neurodevelopmental disabilities and their parents*, J. of Pediatric and Child Health (2021), <https://onlinelibrary.wiley.com/doi/10.1111/jpc.15285>.

in violation of their rights under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

VII. Governor Abbott’s Executive Order GA-38 Prevents Local Communities from Adopting Protections Most Appropriate for Their Students

Since March 13, 2020, Governor Abbott has recognized by proclamation the “imminent threat” posed by the COVID-19 pandemic for all counties across the State of Texas. He has renewed that proclamation each month by successive executive orders and each recognize that the COVID-19 threat remains in place today.

Notably, among his executive orders, in July 2020, Governor Abbott issued Executive Order GA-29, which required all Texans to “wear a face covering over the nose and mouth when inside a commercial entity or other building or space open to the public” in counties that exceeded certain thresholds of positive cases unless those counties affirmatively opted out of the mask requirement. In doing so, Governor Abbott recognized the importance of both using masks to help limit and control the spread of COVID-19⁴² and the differences across Texas communities that may require a variety of approaches as to masking.

⁴² Indeed, Governor Abbott emphasized at that time that wearing masks “is the best strategy you can use to make sure that you and others do not contract Covid-19,” citing a Texas A&M study on face masks. SBG San Antonio, *Gov. Abbott: ‘Masks are our best option’ against COVID-19 spike*, June 24, 2020, <https://news4sanantonio.com/news/local/gov-abbott-masks-are-our-best-option-against-covid-19-spike>; see also Keith Randall, Texas A&M Study: Face Masks Critical In Preventing Spread Of COVID-19, *Texas A&M Today*, June 12, 2020 (“A study by a team of researchers led by a Texas A&M University professor has found that not wearing a face mask dramatically increases a person’s chances of being infected by the COVID-19 virus.”). <https://today.tamu.edu/2020/06/12/texas-am-study-face-masks-critical-in-preventing-spread-of-covid-19/> (“A study by a team of researchers led by a Texas A&M University professor has found that not wearing a face mask dramatically increases a person’s chances of being infected by the COVID-19 virus.”).

Despite the real threat of COVID-19 that Texans continue to face and despite his prior endorsement of masking as a means of protection from the threat, Governor Abbott's Executive Order GA-38 purports to prohibit any requirement by "any jurisdiction to wear or to mandate the wearing of a face covering."⁴³ This order will prevent those students with disabilities making them most vulnerable to COVID-19 from safely attending school.

Furthermore, all school districts have an obligation under the ADA and Section 504 to make their schools accessible to, and usable by, children with disabilities, 28 C.F.R. § 35.150(a); to avoid exclusion, discrimination, or unequal treatment, 28 C.F.R. § 35.130(a) and (b)(1); to provide services in school if possible, 28 C.F.R. § 35.130(d); and to provide reasonable modifications or accommodations to its policies and practices as required for these children. 28 C.F.R. § 35.130(b)(7)(i). Order GA-38 prevents the Defendant and other districts from complying with those obligations, contravening federal law.

VIII. Texas Families of Students with High-Risk Disabilities and Health Conditions Face An Impossible Choice

The Governor's Order has put parents and caregivers in the impossible situation of having to choose between protecting the health and safety of their at-risk child and providing those students with desperately needed in-person instruction and services by returning to school.

As the protection and advocacy agency in the state of Texas, Disability Rights Texas has received sustained calls and emails from parents in every corner of the state desperate for help overturning the Governor's Order so that schools can implement policies to allow them to send

⁴³ Exec. Order GA 38, https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf (July 29, 2021).

their children with high-risk disabilities to school without fearing it will result in hospitalization or death. For example:

- M.P. is an eleven-year-old student with Down syndrome in Fort Bend ISD. She participated in virtual learning all last year because of the high risk of serious illness, hospitalization and death that faces people with Down syndrome who contract COVID-19. She also had a severe case of pneumonia four years ago that has further compromised her respiratory system putting her at even more risk. Due to the lack of in-person instruction, she has regressed academically and socially and needs in-person instruction to benefit from her special education program, which includes a combination of special and general education classes with a modified curriculum and related services to aid in her communication. Fort Bend ISD initially announced plans to have a mask mandate but reversed course with conflicting guidance from TEA and the Fort Bend County Judge.
- N.C. is an eight-year-old student with Sanfilippo Syndrome, which is a type of childhood dementia and a neurological disorder. She is in the Friendswood ISD in Galveston County and receives significant special education modifications including assistive technology to help her communicate in the classroom and was unable to benefit from virtual instruction. Children with neurological conditions such as N.C. are at a higher risk of hospitalization, severe illness, or death should they contract COVID-19, and her parents need her school to be able to institute policies to allow her to safely attend. A recent study of children with her type of rare degenerative genetic disorder has found that school closures and virtual instruction can result in permanent loss of skills and even reduced life expectancy.⁴⁴

⁴⁴ Julie B. Eisengart, et al., *Issues of COVID-19-Related Distance Learning for Children with Neuronal Mucopolysaccharidoses*, Molecular Genetics and Metabolism (2021).

Galveston County is not currently under a court order allowing them to protect their residents from COVID-19, and Friendswood ISD is not currently implementing a mask mandate in schools.

- J.R. is an eight-year-old student in San Antonio ISD and lives with moderate to severe asthma, generalized anxiety disorder, ADHD, and a growth-hormone deficiency. After remaining in virtual schooling all of last year, she needs the academic and social benefits of in-person instruction, where the supports from her special education plan can be provided. Pursuant to a temporary restraining order issued by a Bexar County District Judge, which allowed county officials to issue mask requirements to Bexar County school districts, the San Antonio Independent School District has required masks in all of its schools. However, that order was stayed by the Texas Supreme Court on August 26, 2021.⁴⁵ Given Gov. Abbott's recent requests to strike down mask mandates across the state, students like J.R. have no guarantee that masks will continue to be required in their schools and that their safety will be maintained during in-person instruction.

Students with disabilities need full, complete, and safe access to their education. Decisions affecting these most vulnerable students should be made by those closest to the student—parents, educators, and community leaders. This Court should reject the barriers put in place by Governor Abbott's Executive Order and allow local authorities to adopt mask requirements to protect their students and staff where best for their communities.

⁴⁵ See *In re Abbott*, No. 21-0720, Order (Tex. Aug. 26, 2021)

CONCLUSION

For these reasons, the Court should deny the State's request for relief, including its applications for temporary injunctive relief.

Dated: September 14, 2021

Respectfully submitted,

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T. by and through her parents and
and next friends, et al

Plaintiffs

V.

Civil Action No. 1:21-cv-00717-LY

Governor Greg Abbott, in his official Capacity as Governor of Texas; Mike Morath, in his official capacity as the Commissioner of the Texas Education Agency; the Texas Education Agency; And Attorney General Ken Paxton, in is official capacity as Attorney General of Texas

Defendants

DEFENDANTS' BRIEF ADDRESSING PROPRIETY OF CURRENT PARTIES

Defendants Governor Greg Abbott, in his official capacity as Governor of Texas, Mike Morath Morath, in his official capacity as the Commissioner of the Texas Education Agency, the Texas Education Agency, and Attorney General Ken Paxton, in his official capacity as Attorney General of Texas (collectively “Defendants”) file this Brief Addressing Propriety of Current Parties. In support, Defendants offer the following for the Court’s consideration:

I. INTRODUCTION

Pursuant to the Court's instructions, Defendants file this brief to address whether Plaintiffs have brought suit against the correct parties and, if successful on the merits, whether the relief they seek from Defendants will redress their alleged injuries. Further pursuant to the Court's instructions, and pursuant to the agreement of the parties, the instant brief is not a waiver of defenses, affirmative

or otherwise, under due order of pleadings or similar procedural requisites. The Court has requested that the parties use the instant briefing to provide notice of their respective positions and the leading case law supporting those positions with minimal argument. Defendants have endeavored to comply with these instructions.

II. RELEVANT FACTS

This case arises out of Governor Abbott’s July 29, 2021 Executive Order GA-38 (“GA-38”) prohibiting governmental entities, including school districts, from requiring anyone to wear a mask and TEA’s August 5, 2021 Public Health Guidance (“Public Health Guidance”) publishing the requirements for the operation of public schools in compliance with GA-38.¹ GA-38’s prohibition on mask mandates expressly supersedes contrary requirements issued by local governmental entities or their officials, and those who fail to comply with this executive order are subject to a criminal penalty of up to \$1,000. Dkt. 21.1 ¶4.b. GA-38 also provides that public schools may operate in compliance with the Governor’s executive order and by the guidance issued by TEA. *Id.* ¶3.e. While the Public Health Guidance does set forth the prohibitions and requirements of GA-38, it also recommends “that public school systems consult with their local public health authorities and local legal counsel **before making final decisions regarding the implementation of this guidance.**” Dkt 21.2 at 2.

Plaintiffs in this case attend Texas public schools and assert that they are individuals with disabilities as defined under the Americans with Disabilities Act (“ADA”) and Section 504 the Rehabilitation Act of 1973 (“Section 504”). They allege their disabilities make them particularly susceptible to COVID-19, and that their susceptibility makes attending public school alongside others

¹ The Public Health Guidance attached to Plaintiffs’ Complaint as Exhibit 2 (Dkt. 21.2) has been superseded. The section relating to masks now states: “mask provisions of GA-38 are not being enforced as the result of ongoing litigation. Further guidance will be made available after the court issues are resolved.” The version currently in effect can be found at <https://tea.texas.gov/sites/default/files/covid/SY-20-21-Public-Health-Guidance.pdf>.

who do not wear masks so dangerous as to preclude their in-person attendance. Plaintiffs have brought suit claiming that Defendants Abbott, Morath, and Paxton, in their official capacities, have violated the ADA, Section 504, and that GA-38 and TEA's Public Health Guidance are preempted by the American Rescue Plan Act of 2021. Plaintiffs request the following relief from this Court:

1. A declaration that GA-38 and TEA's Public Health Guidance violate Plaintiffs' rights under the ADA and Section 504, and are pre-empted by the American Rescue Plan Act;
2. A temporary restraining order, as well as preliminary and permanent injunctive relief, enjoining Defendants from violating the ADA, Section 504, and the American Rescue Plan Act by prohibiting local school districts from requiring masks for their students and staff; and
3. Preliminary and permanent injunctive relief enjoining Defendants from violating the ADA, Section 504, and the American Rescue Plan Act by withholding state and federal educational funds from districts that elect to require students and staff to wear masks.

For the reasons set forth below, Defendants assert they are not the proper parties to this lawsuit.

III. AUTHORITY

The issue upon which the Court requested briefing is whether the Governor, the Attorney General, the Commissioner of the Texas Education Agency, and the Texas Education Agency are proper parties to this suit. For the reasons stated below, Defendants are not proper parties and should be dismissed from this case for lack of jurisdiction.

A. The Governor

Governor Abbott is not a proper party. GA-38 is enforceable by criminal prosecution of the \$1,000 fine. Governor Abbott does not enforce GA-38 and therefore the injury is not fairly traceable to him, nor can it be redressed against him. In support of this conclusion, Governor Abbott respectfully directs the Court's attention to the following authorities:

- *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992) ("the irreducible constitutional minimum of standing contains three elements": injury in fact; causation such that the injury is "fairly ... trace[able] to the challenged action of the defendant"; and redressability by favorable decision)

- *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (“Because the plaintiffs have pointed to nothing that outlines a relevant enforcement role for Governor Abbott, the plaintiffs’ injuries likely cannot be fairly traced to him.”)
- *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (holding that the Governor’s disclaim of intent to enforce an executive order based on his acknowledgment that it would be enforced by local district attorneys meant that the plaintiffs had not established the credible threat of prosecution required to establish standing for their pre-enforcement challenge)
- *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (holding that, in the context of a statutory challenge, to demonstrate standing to sue the governor and attorney general, the plaintiffs needed to demonstrate how those state officials played a causal role in their injury or could redress their actual or threatened injury)
- *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (holding that the Governor was not a proper defendant in a challenge to an executive order because “the power to promulgate law is not the power to enforce it” and the Governor has authority to “‘issue,’ ‘amend,’ or ‘rescind’ executive orders, not to ‘enforce’ them”), *cert. granted, judgment vacated on other grounds sub nom. Planned Parenthood v. Abbott*, No. 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021)
- *6th Street Business Partners LLC v. Abbott*, No. 1:20-CV-706-RP, 2020 WL 4274589, at *3–4 (W.D. Tex. 2020) (Pitman, J.) (holding that the plaintiffs had not demonstrated Article III standing because their injuries could not be fairly traced to nor redressed by the Governor as the Governor lacked authority to enforce his executive order)
- *Morris v. Livingston*, 739 F.3d 740, 756 (5th Cir. 2014) (holding that the Governor was not a proper defendant in a challenge to a state law because he lacked a particular duty to enforce the statute in question)

B. The Attorney General

The Attorney General is not a proper party. Again, GA-38 is enforceable by criminal prosecution of the \$1,000 fine. The Attorney General does not enforce GA-38 and therefore the injury is not fairly traceable to him, nor can be it be redressed against him. Even if this Court were to issue an injunction against the Attorney General, GA-38 would still be enforceable by local district attorneys—parties who are not before the Court. In support of this conclusion, the Attorney General respectfully directs the Court’s attention to the following authorities:

- *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992) (“irreducible constitutional minimum of standing contains three elements”: injury in fact; causation such that the injury is “fairly ... trace[able] to the challenged action of the defendant”; and redressability by favorable decision)

- *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (holding that the Attorney General’s disclaimer of intent to enforce an executive order based on his acknowledgment that it would be enforced by local district attorneys meant that the plaintiffs had not established the credible threat of prosecution required to establish standing for their pre-enforcement challenge)
- *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (holding that the Attorney General was not a proper defendant in a challenge to an executive order because his authority to prosecute a violation of an executive order was insufficient to demonstrate the requisite enforcement connection), *cert. granted, judgment vacated on other grounds sub nom. Planned Parenthood v. Abbott*, No. 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021)
- *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976) (“It is equally speculative whether the desired exercise of the court’s remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.”)
- *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (“Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.”) (emphasis in original)
- *Ex parte Young*, 209 U.S. 123, 157 (1908) (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply because he “might represent the state in litigation involving the enforcement of its statutes”)
- *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) (“It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.”)
- *Sullo & Bobbitt, PLLC v. Abbott*, 2012 WL 2796794, at *5 (N.D. Tex. 2012) (Fitzwater, C.J.) (“[T]he real value of the judicial pronouncement—what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff* and not of a third party.”) (emphasis in original), *aff’d*, 2013 WL 3783751 (5th Cir. 2013)
- *Inclusive Cmty’s Project, Inc. v. Dep’t of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (holding that when a plaintiff is not the direct object of government action, it is difficult to establish standing)

C. The Commissioner of the Texas Education Agency

Commissioner Morath is not a proper party. By its own terms, the Public Health Guidance is neither mandatory nor binding. Commissioner Morath does not “enforce” the Public Health

Guidance and has made no effort to do so, and therefore Plaintiffs' alleged injury is not fairly traceable to him, nor can it be redressed by him. Commissioner Morath did not issue GA-38, which contemplates no enforcement role for Commissioner Morath, and has neither threatened nor sought to enforce the order.

- *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992) (“irreducible constitutional minimum of standing contains three elements”: injury in fact; causation such that the injury is “fairly ... trace[able] to the challenged action of the defendant”; and redressability by favorable decision)
- *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (holding that plaintiffs did not have standing to bring statutory challenge against government officials who did not have “any duty or ability to do *anything*” relating to enforcement of the statute)
- *Ex parte Young*, 209 U.S. 123, 157 (1908) (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply because he “might represent the state in litigation involving the enforcement of its statutes”)
- *K.P. v. LaBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (holding that “[e]nforcement typically involves compulsion or constraint”)
- *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (showing the requisite “connection to the enforcement” of the challenged provision requires “some scintilla of enforcement by the relevant state official with respect to the challenged law”)
- *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976) (“It is equally speculative whether the desired exercise of the court’s remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.”)

D. The Texas Education Agency

The TEA is not a proper party for substantially the same reasons as Commissioner Morath. The Public Health Guidance is not mandatory, and the TEA has not sought to enforce it. Plaintiffs' alleged injury is therefore not fairly traceable to the TEA, nor could such injury be redressed by it. As with Commissioner Morath, the TEA did not issue GA-38. GA-38 contemplates no enforcement role for TEA. TEA claims no such role, and has not sought to enforce GA-38 in any way.

- *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992) (“irreducible constitutional minimum of

standing contains three elements”: injury in fact; causation such that the injury is “fairly ... trace[able] to the challenged action of the defendant”; and redressability by favorable decision)

- *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (holding that plaintiffs did not have standing to bring statutory challenge against government officials who did not have “any duty or ability to do *anything*” relating to enforcement of the statute)
- *Ex parte Young*, 209 U.S. 123, 157 (1908) (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply because he “might represent the state in litigation involving the enforcement of its statutes”)
- *Sullo & Bobbitt, PLLC v. Abbott*, 2012 WL 2796794, at *5 (N.D. Tex. 2012) (Fitzwater, C.J.) (“[T]he real value of the judicial pronouncement—what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff* and not of a third party.”) (emphasis in original), *aff’d*, 2013 WL 3783751 (5th Cir. 2013)
- *K.P. v. LaBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (holding that “[e]nforcement typically involves compulsion or constraint.”)
- *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (showing the requisite “connection to the enforcement” of the challenged provision requires “some scintilla of enforcement by the relevant state official with respect to the challenged law.”)
- *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976) (“It is equally speculative whether the desired exercise of the court’s remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.”)

IV. CONCLUSION

For the reasons stated above, Defendants believe they are not proper parties. Should this Court disagree, Defendants look forward to briefing the issues more fully in the context of a full motion to dismiss that also includes arguments regarding Plaintiff’s failure to state a claim more generally, apart from the named parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 3, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Ryan G. Kercher
RYAN G. KERCHER
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Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T. by and through her parents and
and next friends, et al.

Plaintiffs,

V.

Civil Action No. 1:21-cv-00717-LY

Governor Greg Abbott, in his official Capacity as Governor of Texas; Mike Morath, in his official capacity as the Commissioner of the Texas Education Agency; the Texas Education Agency; and Attorney General Ken Paxton, in is official capacity as Attorney General of Texas,

Defendants.

DEFENDANTS' MOTION To DISMISS

INTRODUCTION

Plaintiffs, 14 Texas-based children with disabilities, are suing to enjoin two COVID-19-related orders: Governor Abbott’s Executive Order GA-38 (“GA-38”) and the Texas Education Agency (“TEA”)’s August 5, 2021 Guidance (“August 5th Guidance,” collectively, the “Challenged Orders”). They complain that the Challenged Orders—which require nothing of Plaintiffs themselves—stops local officials from mandating the wearing of facemasks.

Plaintiffs' claims suffer from numerous jurisdictional defects, with standing being the most glaring. Plaintiffs cite the risk of a COVID-19 infection as their jurisdictional hook. However, this injury is speculative as it turns on: (1) how their school districts will react if the Challenged Orders are enjoined; (2) how students in those districts will react to a mask mandate; (3) who would contract COVID-19 in a district that mandated masks, as opposed to one that just encouraged masks; (4)

whether Plaintiffs would contract COVID-19 themselves and from whom; (5) the severity of Plaintiffs' infection (asymptomatic, mild, severe, etc.) and the reasons for those reactions; and (6) various other contingencies. Plaintiffs will need to show that each contingency underlying their injuries is certainly impending to obtain standing, which they did not and realistically cannot do. What's more, due to traceability and generalized grievance issues, Plaintiffs must connect their future COVID-19 infections to both the Challenged Orders *and* their disabilities.

If Plaintiffs could somehow overcome the "certainly impending" jurisdictional hurdle, they would then need to convince this Court to ignore 120 years of caselaw requiring an enforcement connection between the defendants sued and the statutes challenged. Yet numerous Fifth Circuit and Supreme Court decisions confirm that Plaintiffs sued the wrong defendants here and that they lack standing for various other reasons.

Plaintiffs': (1) claims should be dismissed for lack of standing and on sovereign immunity grounds under Fed. R. Civ. P. 12(b)(1); (2) claims should be dismissed as inadequately pled under Fed. R. Civ. P. 12(b)(6); and (3) request for a temporary restraining order and preliminary injunction should be denied, most notably because Plaintiffs are not likely to succeed on their meritless claims.¹

BACKGROUND

I. The Texas Disaster Act, GA-38, and the August 5th Guidance.

This case centers on Governor Abbott's GA-38 and the TEA's August 5th Guidance.

GA-38: GA-38 is one of many executive orders Governor Abbott issued in response to the COVID-19 pandemic. This order is authorized by the Texas Disaster Act ("TDA"), the State's comprehensive set of statutes allocating powers and responsibilities during a disaster.² The TDA

¹ As the issues overlap, Defendants will file their motion to dismiss separately from their response to Plaintiffs' motion for a temporary restraining order. These two filings are substantively identical. The purpose of filing two separate pleadings is to avoid having the filings rejected by PACER if we combined them in one brief.

² See Tex. Gov't Code §§ 418.001 *et seq.*

makes the Governor “responsible for meeting . . . the dangers to the state and people presented by disasters.”³ The TDA gives the Governor a broad array of powers allowing him to fulfill this responsibility.⁴ Among other relevant provisions, Tex. Gov’t Code § 418.012 gives the Governor the power to issue executive orders carrying “the force and effect of law.”⁵ The Texas Supreme Court has interpreted the TDA to allow the Governor to issue orders aimed at a variety of concerns, such as “encouraging economic recovery, preserving constitutional rights, or promoting ballot integrity.”⁶ The scope of the Governor’s emergency powers is not at issue here.

Governor Abbott issued GA-38 on July 29, 2021.⁷ This order seeks to create a uniform response to the COVID-19 pandemic, one that gives individuals the autonomy to make personal health decisions free from government control.⁸ GA-38 bans most state and local officials from mandating the wearing of face masks and preempts any conflicting local orders on this issue.⁹ GA-38 “strongly encourages” people to wear masks¹⁰ but ultimately gives individuals the freedom to choose whether or not to wear a mask.¹¹

A local official or entity who imposes a mask mandate in violation of GA-38 is subject to a fine of up to \$1,000.¹² Other than local officials, individuals cannot be punished under this section.¹³ The ban on local mask mandates first appeared in GA-34, which was issued on March 2, 2021 and then again was expressly carried forward in GA-36, which was issued on May 18, 2021.¹⁴

³ *Id.* at § 418.011.

⁴ *Id.* at §§ 418.011–.026.

⁵ *Id.* at § 418.012.

⁶ *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 918 (Tex. 2020).

⁷ Ex. D. A copy of GA-38 is publicly available at the following website: https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf (last visited September 12, 2021)

⁸ *Id.* at 1.

⁹ *Id.* at 3–5.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 3.

¹² *Id.* at 4–5.

¹³ *See id.*

¹⁴ Ex. E at 2. A copy of GA-36 is publicly available at the following website: <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2021/GA-36.pdf> (last visited September 12, 2021).

The August 5th Guidance: It is important to note at the outset that the August 5th Guidance related to various issues affecting schools due to COVID-19 has been superseded twice and is no longer in effect or enforceable. The portion of the August 5th Guidance Plaintiffs assert as relevant, although no longer in effect, merely reiterates the requirements of GA-38:

Per GA-38, school systems cannot require students or staff to wear a mask. GA-38 addressed government-mandated face coverings in response to the COVID-19 pandemic. Other authority to require protective equipment, including masks, in an employment setting is not necessarily affected by GA-38.

School systems must allow individuals to wear a mask if they choose to do so.¹⁵

The August 5th Guidance does not specify how it will be enforced or who will enforce it.¹⁶ The TEA and Commissioner Morath (the “TEA Defendants”) never enforced or threatened to enforce the August 5th Guidance’s mask provisions against anyone.¹⁷ TEA Guidances like this are aimed at school districts, not individual students.¹⁸ TEA Defendants have never enforced a Guidance against an individual student.¹⁹

The August 5th Guidance was superseded two weeks later when TEA issued a revised guidance (the “August 19th Guidance”) that “replac[ed] all prior guidances.”²⁰ Relevant here, the August 19th Guidance’s mask provision stated as follows: “Please note, mask provisions of GA-38 are not being enforced as the result of ongoing litigation. Further guidance will be made available after the court issues are resolved.”²¹ The August 19th Guidance did not specify who would be enforcing GA-38’s mask provisions absent ongoing litigation.²²

¹⁵ *Id.* at 1.

¹⁶ *See id.*

¹⁷ Declaration of Megan Aghazadian (“Aghazadian Decl.”) at ¶ 8.

¹⁸ Aghazadian Decl. at ¶ 9.

¹⁹ *Id.*

²⁰ Ex. B at 1.

²¹ *Id.*

²² *See id.*

The August 19th Guidance was superseded on September 2, 2021 (the “September 2nd Guidance”).²³ Like its predecessor, the September 2nd Guidance also states that “[the] mask provisions of GA-38 are not being enforced as the result of ongoing litigation” due to “court issues” regarding GA-38.²⁴ It notes that TEA will issue a further guidance regarding face masks after pending court issues are resolved.²⁵ It is unclear when these pending court issues will be resolved, when the TEA will release a revised guidance, or what that future guidance will say on the matter of masks in schools.²⁶ TEA Defendants cannot enforce the August 5th Guidance as this guidance is no longer in effect.²⁷

II. An Overview of Plaintiffs’ Claims.

Plaintiffs are 14 young Texas-based students who all claim to be disabled,²⁸ and at “an increased risk of serious complications or death” from COVID-19 due to their disabilities.²⁹ Plaintiffs challenge GA-38’s ban on mask mandates and the related portion of the superseded August 5th Guidance referencing GA-38’s position on mask mandates.³⁰ Plaintiffs do not allege that these Challenged Orders were ever enforced against them or explain how they could ever be in the future.³¹

Plaintiffs claim the Challenged Orders: (1) violate the Americans with Disabilities Act (“ADA”); (2) violate Section 505 of the Rehabilitation Act (“Section 504”); and (3) are preempted by the American Rescue Plan Act of 2021 (“ARPA Act”).³² Plaintiffs seek to enjoin Defendants from enforcing the Challenged Orders as well as declaratory relief against them as a group.³³ These claims

²³ Ex. C at 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Aghazadian Decl. at ¶ 10.

²⁷ *Id.* at ¶ 11.

²⁸ ECF 21 (“Am. Compl.”) at ¶¶ 2, 14–27.

²⁹ *Id.* at ¶ 2.

³⁰ *Id.* at ¶ 2; ECF 21-2.

³¹ *See generally* Am. Compl.

³² *Id.* at ¶¶ 1–3, 7, 32, 77–99.

³³ *Id.* at pgs. 44–45 (Prayer for Relief).

rest on Plaintiffs’ conclusory assertions that the Challenged Orders will increase the spread of COVID-19 in schools, resulting in Plaintiffs either (1) becoming infected with COVID-19 if they attend school in-person or (2) being forced to stay home to avoid contracting COVID-19.³⁴ However, absent from Plaintiffs’ pleading is any allegation that they have been or are currently unable to attend school in person due to the Challenged Orders.³⁵ This is a curious omission given that Plaintiffs’ entire case turns on their alleged inability to attend in-person classes.³⁶ Plaintiffs do not allege they, or anyone else for that matter, has contracted COVID-19 due to the Challenged Orders.³⁷

Plaintiffs do not identify which, if any, of the particular schools they attend currently have mask mandates in place.³⁸ Digging a bit deeper reveals that six of their districts have mask mandates in place despite the Challenged Orders.³⁹ As Plaintiffs ignore this issue, they do not explain why these six districts imposed mask mandates or why the eight other districts did not impose mask mandates.⁴⁰

Plaintiffs spend numerous pages detailing Attorney General Paxton’s “Enforcement Campaign” regarding GA-38,⁴¹ which refers to his efforts to stop local officials from violating a state law.⁴² Plaintiffs do not allege that Attorney General Paxton ever threatened to sue them, or anyone closely associated with them, for violating GA-38.⁴³ Indeed, such a suit would be impossible as GA-

³⁴ See Am. Compl. at ¶¶ 52–55, 63–76.

³⁵ See *id.* at ¶¶ 63–76.

³⁶ See *id.* at ¶¶ 32–38; see also ECF 7 at 7 (noting that Plaintiffs’ schools will resume in-person classes by August 23, 2021, at the latest).

³⁷ See *id.*

³⁸ See *id.*

³⁹ Compare *id.* at ¶¶ 63–76, with *COVID-19: List of Government Entities Unlawfully Imposing Mask Mandates*, ATTORNEY GENERAL OF TEXAS, <https://www.texasattorneygeneral.gov/covid-governmental-entity-compliance> (Sept. 8, 2021, 9:24 a.m.). The six schools that have imposed mask mandates are: (1) Round Rock Independent School District; (2) Edgewood Independent School District; (3) San Antonio Independent School District; (4) IDEA Public Schools School District; (5) Leander Independent School District; and (6) Richardson Independent School District.

⁴⁰ See Am. Compl. at ¶¶ 63–76.

⁴¹ See, e.g., *id.* at ¶¶ 56–61 (bold omitted).

⁴² See Tex. Gov’t Code § 418.012 (giving the Governor’s emergency orders the force and effect of law).

⁴³ See *id.*

38 regulates the conduct of public officials and entities, not individuals.⁴⁴ Plaintiffs do not allege that Governor Abbott or TEA Defendants ever enforced or threatened to enforce GA-38.⁴⁵

LEGAL STANDARDS APPLICABLE TO DEFENDANTS' MOTION TO DISMISS

A motion to dismiss under FED. R. CIV. P. 12(b)(6) turns on whether the plaintiff pled a “plausible” (as opposed to just a “possible”) claim for relief—*i.e.*, whether the plaintiff pled “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁴⁶ If “a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”⁴⁷ On such a motion, the court can rely on: (1) the complaint; (2) the complaint’s attachments; (3) a defendant’s attachments that were referenced in the complaint and central to the plaintiff’s claim; and (4) matters on which a court may take judicial notice.⁴⁸

Justiciability issues such as standing and sovereign immunity go to the court’s jurisdiction over the dispute and thus are subject to a FED. R. CIV. P. 12(b)(1) motion to dismiss.⁴⁹ In addition to relying on the items addressed above, on a Rule 12(b)(1) motion to dismiss the court can also weigh the evidence and resolve disputed facts to ensure that it has power over the case.⁵⁰ Plaintiffs, “as the parties asserting federal subject-matter jurisdiction, bear the burden of proving that its requirements are met.”⁵¹

⁴⁴ See Ex. D.

⁴⁵ See generally Am. Compl.

⁴⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁴⁷ *Id.* (quotations omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁴⁸ See, e.g., *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000).

⁴⁹ See, e.g., *Block v. Texas Bd. of Law Examiners*, 952 F.3d 613, 616–17 (5th Cir. 2020); *Moore v. Bryant*, 853 F.3d 245, 248–49 (5th Cir. 2017).

⁵⁰ *Barrera-Montenegro v. U.S. & Drug Enft Admin.*, 74 F.3d 657, 659 (5th Cir. 1996); *MDPhysicians & Assoc., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992).

⁵¹ *Willoughby v. U.S. ex rel. U.S. Dep't of the Army*, 730 F.3d 476, 479 (5th Cir. 2013).

RULE 12(b)(1) ARGUMENTS

I. Plaintiffs Lack Standing to Bring this Suit.

Plaintiffs’ claim to standing is foreclosed by multiple Supreme Court and Fifth Circuit decisions. Plaintiffs’ alleged injuries—being unable to safely return to school due to the Challenged Orders—are too remote and speculative to confer standing. And their injuries are not redressable by a favorable decision in this suit, largely because Plaintiffs did not sue the officials with proper enforcement authority.

Plaintiffs’ prior brief tries to confuse the standing issue.⁵² Thus, we will first clarify the nature of Plaintiffs’ injury, explaining that Plaintiffs must meet the test applicable to “imminent” injuries. We will then explain that Plaintiffs need to sue an official or entity with enforcement authority over the Challenged Orders. Finally, we will analyze standing issues particular to each Defendant and note the various binding cases that foreclose Plaintiffs’ claim to standing.

A. Plaintiffs’ Must Satisfy the Test for “Imminent” Injuries.

An injury can either be “actual” or “imminent” for standing purposes.⁵³ An imminent injury is subject to a more stringent standing test.⁵⁴ To be legally cognizable, the threatened injury must be “certainly impending”; “allegations of *possible* future injury are not sufficient.”⁵⁵

Plaintiffs seek only equitable relief in this suit.⁵⁶ Under Fifth Circuit and Supreme Court precedent, requests for equitable relief implicate the standing test for “imminent” injuries.⁵⁷ This

⁵² See generally ECF 26.

⁵³ See, e.g., *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (hereinafter “*Amnesty International*”).

⁵⁴ See *id.*

⁵⁵ *Id.* (brackets and quotations omitted).

⁵⁶ See Am. Compl. at pgs. 44–45 (Prayer for Relief).

⁵⁷ See, e.g., *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019); (“[P]laintiffs seeking injunctive relief must show a continuing or threatened future injury to themselves.”); *Deutsch v. Annis Enterprises, Inc.*, 882 F.3d 169, 173 (5th Cir. 2018) (noting that the “standing requirements for equitable relief” require the plaintiff to “show that ‘there is a real and immediate threat of repeated injury’”) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *Machete Productions, L.L.C. v. Page*, 809 F.3d 281, 288 (5th Cir. 2015) (“In the context of prospective injunctive and declaratory relief, past exposure to illegal conduct, by itself, does not evince a present case or controversy and thus cannot establish standing.”) (citing *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974)).

means Plaintiffs must show a “substantial risk that they will suffer the potential future injury absent the requested relief.”⁵⁸

This conclusion is also justified by the nature of Plaintiffs’ alleged injuries. Plaintiffs claim the Challenged Orders will increase the spread of COVID-19 in schools, which will result in Plaintiffs either (1) becoming infected with COVID-19 if they attend school in-person or (2) being forced to stay home to avoid getting COVID-19.⁵⁹ Fearing a future COVID-19 infection is a forward-looking injury for obvious reasons.⁶⁰ And staying home from school (whether now or in the future) due to fear of a future COVID-19 infection also qualifies as forward-looking injury since: “[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”⁶¹

In sum, Plaintiffs’ alleged injuries are subject to the stricter standing test applicable to “imminent” injuries. As shown below, Plaintiffs lack standing as they have not, and realistically cannot, meet this test.

B. Plaintiffs did Not Plausibly Alleged a “Certainly Impending” Injury Fairly Traceable to the Challenged Orders.

In *Glass v. Paxton*, the Fifth Circuit set forth a two-step test for analyzing whether an injury is too speculative to confer standing. First, identify the core injury at issue.⁶² If the injury is self-inflicted (like self-censorship or, here, staying home from school), the focus is on “the catalyst” for that self-inflicted injury—i.e. the harm the plaintiffs sought to avoid.⁶³ Second, “identify each contingency

⁵⁸ *Stringer*, 942 F.3d at 721. The “substantial risk” standard is likely synonymous with—or at least not meaningfully distinguishable from—the “certainly impending” standard. *See Amnesty International*, 568 U.S. at 414 n.5).

⁵⁹ *See* Am. Compl. at ¶¶ 52–55, 63–76.

⁶⁰ *See Amnesty International*, 568 U.S. at 409 (“[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.”) (quotations and brackets omitted).

⁶¹ *Id.* at 416; *Glass v. Paxton*, 900 F.3d 233, 238–42 (5th Cir. 2018) (applying *Amnesty International*’s “certainly impending” test to professors’ decision to self-censor their speech due to the alleged increased risk of harm stemming from a statute allowing handguns in college classrooms).

⁶² *Glass*, 900 F.3d at 239.

⁶³ *Id.*

prompting” the injury (or the catalyst for that injury).⁶⁴ “Each link in the chain of contingencies must be ‘certainly impending’ to confer standing.”⁶⁵

Step 1: Identify the Harm: We analyzed this issue above. Plaintiffs’ core injury is the threat of a COVID-19 infection. For obvious traceability reasons, Plaintiffs cannot rely on the threat we all face from COVID-19. Rather, Plaintiffs must show a certainly impending threat of a COVID-19 infection stemming from the Challenged Orders.⁶⁶

Step 2: Identify Each Link in the Chain of Contingencies: There are at least eight contingencies underlying Plaintiffs’ claim to standing.

Contingency #1: Will the Plaintiffs’ Schools Impose a Mask Mandate? Plaintiffs must show a substantial likelihood that their schools would impose mask mandates were it not for the Challenged Orders’ ban on mask mandates. The 14 Plaintiffs attend 14 different school districts.⁶⁷ Of these 14 school districts, six have mask mandates despite the Challenged Orders.⁶⁸ The six Plaintiffs at the “mask mandate” school districts are not being injured by the Challenged Orders, and it is unlikely that this Court’s injunction against the Challenged Orders will materially change the behavior of school districts already defying GA-38, which is a state law.⁶⁹

For the eight remaining districts, their decision not to impose a mask mandate must be attributable to the Challenged Orders for purposes of Plaintiffs’ standing. For example, a district that does not think mask mandates are good policy—or that used the Challenged Orders as political cover

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See, e.g., *California v. Texas*, 141 S. Ct. 2104, 2108 (2021) (finding that the plaintiff must assert an injury fairly traceable “to the allegedly unlawful conduct” challenged in the suit) (quotations omitted); *Amnesty International*, 568 U.S. at 401–02 (“[E]ven if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to [the challenged statute].”).

⁶⁷ Am. Compl. at ¶¶ 63–76.

⁶⁸ Compare *id.* at ¶¶ 63–76, with *COVID-19: List of Government Entities Unlawfully Imposing Mask Mandates*, ATTORNEY GENERAL OF TEXAS, <https://www.texasattorneygeneral.gov/covid-governmental-entity-compliance> (Sept. 8, 2021, 9:24 a.m.). The six schools that have imposed mask mandates are: (1) Round Rock Independent School District; (2) Edgewood Independent School District; (3) San Antonio Independent School District; (4) IDEA Public Schools School District; (5) Leander Independent School District; and (6) Richardson Independent School District.

⁶⁹ Tex. Gov’t Code § 418.012.

for such a belief—would not be impacted by an injunction against the Challenged Orders. In that scenario, Plaintiffs would need to sue the school district’s board of trustees and convince this Court to order those trustees to enact a mask mandate; this Court could not redress Plaintiffs’ injuries as this suit stands now. Realistically, when a plaintiff’s injury turns on how a group of officials will respond to a hot-button political issue at some undetermined point in the future, that plaintiff is going to have serious standing problems.

Contingency #2: A Mask Mandate Will Substantially Increase the Number of School Children Wearing Masks: The Challenged Orders do not prohibit anyone from wearing a mask and, in fact, these orders encourage the wearing of masks.⁷⁰ In this context, Plaintiffs will need to show that an order mandating masks will significantly increase the number of people wearing masks when compared to an order that merely encourages mask wearing. Even for a “mask mandate” order, the compliance rate would turn on numerous factors: the specifics of the order; the rate of enforcement; the penalty for enforcement; loopholes or exceptions to the order, etc. Plaintiffs make no meaningful showing on this point.

Contingency #3: The Hypothetical Maskless Child with COVID-19: Plaintiffs must show a certainly impending risk that some maskless child in the future (the hypothetical “Maskless Child”) in their school will become infected with COVID-19. If the Maskless Child was masked, then his contracting COVID-19 is not traceable to the Challenged Orders. This is an easy contingency to meet, but it leads to other problems for Plaintiffs.

Contingency #4: The Maskless Child Spreads COVID-19 Due to Being Maskless: In this context, the Maskless Child with COVID-19 would need to spread the disease to others in the Plaintiff’s school when he otherwise would not have if he was wearing a mask. If the Maskless Child would have infected others regardless of his masked status, then those subsequent infections are not traceable to the Challenged Orders. This contingency is harder to meet than the one above.

⁷⁰ See Exs. A, D.

Contingency #5: The Maskless Child with COVID-19 Interacts with the Plaintiff: To catch a disease from the Maskless Child, the Plaintiff must interact with him (or at least interact with others who interacted with him). This issue turns on a number of factors: the Maskless Child's hygiene practices; when he discovered he was sick; how he responded to this discovery; how social he is, etc.

Contingency #6: The Plaintiff Catches COVID-19 from the Maskless Child: This contingency is obvious. To have an injury traceable to the Maskless Child (and thus the Challenged Orders), the Plaintiff must contract COVID-19 from the Maskless Child. Less obvious is the fact that the Plaintiff must catch COVID-19 from the Maskless Child *even though the Plaintiff is wearing a mask*. If even the Plaintiffs refuse to wear masks in school, then we have to stop and ask ourselves: What are we even doing here?

Contingency #7: The Plaintiff will have a Severe Reaction to COVID-19: Plaintiffs cannot rely on a generalized fear that they will contract COVID-19. The entire world is under that threat. To overcome the generalized grievance hurdle, Plaintiffs must assert a sufficiently particularized injury.⁷¹

Here, Plaintiffs claim their disabilities put them at “an increased risk of serious complications or death in the event that they contract COVID-19.”⁷² It is the increased risk of “serious complications or death” due to their disabilities that helps create a more particularized injury.⁷³ It is not the risk of an asymptomatic or light case, which is what most children experience if they contract COVID-19.⁷⁴ This leads to the final contingency.

⁷¹ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (defining a generalized grievance as one “shared in substantially equal measure by all or a large class of citizens”); *Kulikowski v. Polis*, 20-CV-03152-RM-NYW, 2021 WL 2517149, at *4 (D. Colo. May 28, 2021) (noting, in the context of a plaintiff's challenge to a governor's COVID-19-related orders, the plaintiff must articulate a particularized injury to overcome generalized grievance issues), report and recommendation adopted, 20-CV-03152-RM-NYW, 2021 WL 2514575 (D. Colo. June 18, 2021); *Delaney v. Baker*, 511 F. Supp. 3d 55, 69 (D. Mass. 2021) (same); *Parker v. Wolf*, 506 F. Supp. 3d 271, 288 (M.D. Pa. 2020) (same).

⁷² Am. Compl. at ¶ 2.

⁷³ Although it is certainly debatable whether, even with this limit, Plaintiffs' alleged injuries are sufficiently particularized to confer standing.

⁷⁴ *Frequently Asked Questions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (“Children can be infected with the virus that causes COVID-19 and get sick with COVID-19. Most children with COVID-19 have mild symptoms or they may have no symptoms at all (‘asymptomatic’).”) (last visited Sept. 11, 2021).

Contingency #8: The Plaintiff will Have a Severe Reaction to COVID-19 Because of His Disability: This follows from the point above. Plaintiffs’ claims turn on their increased risk due to COVID-19 *because of their disabilities*.⁷⁵ Were it not for this “disability” connection, their alleged injuries would be nonjusticiable generalized grievances. Thus, even if Plaintiffs could meet all the contingencies above, they would still lack standing if they would have become seriously ill regardless of their disabilities.

Putting it Together: Plaintiffs did not plausibly allege a certainly impending risk of COVID-19 infection fairly traceable to the Challenged Orders. Under binding precedent, Plaintiffs must allege plausible facts showing that “[e]ach link in the chain of contingencies” noted above is “certainly impending.”⁷⁶ Plaintiffs did not make this showing.

Plaintiffs may contest the fairness of the analysis above—that our analysis effectively insulates the Challenged Orders from review. The Supreme Court rejected this argument in *Amnesty International*, finding “the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”⁷⁷

And our analysis—which is the analysis required by binding precedent—merely reveals that *these* Plaintiffs will not have standing to bring *these* claims. Plaintiffs are not the object of the Challenged Orders, and the Challenged Orders did not require them to do (or not do) anything. It will always be difficult for a plaintiff to establish standing in this context.⁷⁸ That difficulty is magnified when, as here, the plaintiff’s claim to standing turns on how third parties not before the court will respond (school board trustees, the hypothetical Maskless Child, etc.).

⁷⁵ See, e.g., Am. Compl. at ¶¶ 2, 39, ¶¶ 63–76.

⁷⁶ *Glass v. Paxton*, 900 F.3d 233, 239 (5th Cir. 2018).

⁷⁷ *Amnesty International*, 568 U.S. at 420 (quotations and brackets omitted).

⁷⁸ See, e.g., *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (“[To have standing] the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.”); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (“[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.”) (quotations omitted).

C. Plaintiffs Lack Standing, Largely Because They Did Not Sue an Official or Entity with Enforcement Authority Over the Challenged Orders.

1. Over 120 Years of Precedent Require Plaintiffs to Sue an Official or Entity with Enforcement Authority Over the Challenged Orders.

To have standing, a plaintiff *must* sue an official or entity with enforcement authority over the law in question. As we will show in the next section, Plaintiffs’ suit violates this core jurisprudential rule.

Over 120 years of caselaw support the need to sue an official or entity with enforcement authority. In 1899, the U.S. Supreme Court found that the Eleventh Amendment requires there to be a “special relation” between “the state officers named” and the “particular statute alleged to be unconstitutional.”⁷⁹ About a decade later the Court, in *Ex parte Young*, reframed this analysis as requiring state officers to “have some connection with the enforcement of the act” due to Eleventh Amendment concerns.⁸⁰ For over 100 years, courts have applied *Ex parte Young* to find “that the defendant state official must have some enforcement connection with the challenged statute.”⁸¹

The need for an enforcement connection applies equally in the standing context, an analysis that “significant[ly] overlaps” with *Ex parte Young*.⁸² As the Court explained a few months ago in *California v. Texas*: “[O]ur cases have consistently spoken of the need to assert an injury that is the result of a statute’s actual or threatened *enforcement*, whether today or in the future.”⁸³ There, the Court found the plaintiffs’ claims failed on redressability grounds, among other things.⁸⁴ The Supreme Court reasoned that the plaintiffs could not enjoin the Secretary of Health and Human Services from

⁷⁹ *Fitts v. McGhee*, 172 U.S. 516, 530 (1899) (“If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes.”).

⁸⁰ 209 U.S. 123, 157 (1908).

⁸¹ *Okpalobi v. Foster*, 244 F.3d 405, 415 (5th Cir. 2001).

⁸² *Air Evac EMS, Inc. v. Tex., Dep’t of Ins., Div. of Workers’ Comp.*, 851 F.3d 507, 514 (5th Cir. 2017).

⁸³ 141 S. Ct. 2104, 2114 (2021) (citing cases).

⁸⁴ *Id.* at 2115–16.

enforcing a statute that “he ha[d] no power to enforce.”⁸⁵ Nor could the plaintiffs rely on the federal Declaratory Judgment Act, which “cannot alone supply jurisdiction otherwise absent.”⁸⁶

More recently, in *Whole Woman’s Health v. Jackson*, the Supreme Court vacated an injunction to Texas’s Senate Bill (S.B.) 8 on jurisdictional grounds.⁸⁷ In doing so, the Court also framed the issue in terms of “enforcement,” noting the State’s “represent[ation] that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly” and the private defendant’s sworn statement “that he has no present intention to enforce the law.”⁸⁸ As the Court explained: “[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves.”⁸⁹

California v. Texas and *Whole Woman’s Health* are not novel rulings. These decisions reflect well-settled precedent requiring an enforcement connection between the official sued and the statute at issue.⁹⁰ As shown below, Plaintiffs lack standing as they have not sued the requisite enforcing official/entity.

⁸⁵ *Id.* at 2116.

⁸⁶ *Id.*

⁸⁷ 21A24, 2021 WL 3910722, at *1 (U.S. Sept. 1, 2021).

⁸⁸ *Id.*

⁸⁹ *Id.* (citing *California v. Texas*, 141 S. Ct. at 2123).

⁹⁰ See, e.g., *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (“One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury.”); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (“A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.”); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (“The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.”); *Support Working Animals, Inc. v. Governor of Florida*, 20-12665, 2021 WL 3556779, at *5 (11th Cir. Aug. 12, 2021) (“[A] plaintiff’s injury isn’t redressable by prospective relief where other state actors, who aren’t parties to the litigation, would remain free and clear of any judgment and thus free to engage in the [enforcement] conduct that the plaintiffs say injures them”); *Jacobson v. Florida Sec’y of State*, 974 F.3d 1236, 1257 (11th Cir. 2020) (“If rulemaking authority were sufficient to establish traceability, plaintiffs could presumably also challenge a law by suing the legislators who enacted it instead of the officials who execute it. Although in many cases the same official will both make and execute a challenged regulation, that arrangement is not present here.”); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) (“The redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute.”) (quotations omitted); *Bronson v. Swensen*, 500 F.3d 1099, 1112 (10th Cir. 2007) (“The absence of a nexus between Swensen’s enforcement powers and the challenged criminal provisions renders ineffectual plaintiffs’ requested prospective relief.”); *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (“The requirements of *Lujan* are entirely consistent with the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute.”); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (“[P]laintiffs lack standing to contest the statutes authorizing private rights of action, not only because the defendants cannot cause the

2. Plaintiffs Lack Standing as Defendants Do Not Have Enforcement Authority Over the Challenged Orders and for Various Other Reasons.

Below, we will go through Plaintiffs' claims against each Defendant and explain why Plaintiffs lack standing to sue them. These arguments are in addition to the "certainly impending" issue analyzed above, which is an independent reason why Plaintiffs lack standing.

Attorney General Paxton: Plaintiffs lack standing to sue Attorney General Paxton for six reasons.

First, Plaintiffs do not allege that Attorney General Paxton has an enforcement connection to the August 5th Guidance.⁹¹ Thus, they lack standing to sue him over this order.

Second, the Fifth Circuit has recognized that Attorney General Paxton does not "enforce" Governor Abbott's emergency orders: "[W]e hold the Attorney General . . . lacks the required enforcement connection to GA-09 and may not be sued for injunctive relief under the Eleventh Amendment."⁹² The Court's holding was in the context of an *Ex parte Young* analysis and was later vacated when the parties' dispute became moot,⁹³ but its reasoning and conclusion apply equally here.⁹⁴ Put simply, an order enjoining Attorney General Paxton from enforcing GA-38 will not redress Plaintiffs' injuries as he does not enforce GA-38 in the first place.⁹⁵ Rather, Governor Abbott's TDA-

plaintiffs injury by enforcing the private-action statutes, but also because any potential dispute plaintiffs may have with future private plaintiffs could not be redressed by an injunction running only against public prosecutors.").

⁹¹ See Am. Compl. at ¶¶ 31, 56–61; ECF 26, 7–8.

⁹² *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020), cert. granted, judgment vacated sub nom. *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021),

⁹³ *Id.*

⁹⁴ See, e.g., *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (noting the similarities between the *Ex parte Young* and standing analyses), cert. denied sub nom. *City of Austin, Tex. v. Paxton*, 141 S. Ct. 1047 (2021); *Air Evac EMS, Inc.*, 851 F.3d at 520 (same); *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 395 (5th Cir. 2015) (same).

⁹⁵ See, e.g., *California v. Texas*, 141 S. Ct. at 2116 ("Plaintiffs cannot enjoin the Secretary of Health and Human Services, because he has no power to enforce [the challenged statute] against them.").

based emergency orders are akin to criminal statutes.⁹⁶ As a result, these orders are enforced by other officials, most naturally the appropriate local district attorney.⁹⁷

Third, Plaintiffs' claim to standing—that they were injured when Attorney General Paxton sued, or threatened to sue school, school districts⁹⁸—is hard to square with how such issues are normally analyzed. Take *Susan B. Anthony List v. Driehaus* for instance.⁹⁹ There, the Supreme Court analyzed when “the threatened enforcement of a law creates an Article III injury.”¹⁰⁰ The Court set out a three-part test for analyzing such claims: (1) did the plaintiffs show an intent to engage in a course of conduct arguably affected with a constitutional interest; (2) was the plaintiff's intended conduct proscribed by the statute they wish to challenge; and (3) was the threat of future enforcement “substantial”?¹⁰¹ Plaintiffs cannot meet the second part of this test as the Challenged Orders do not prohibit their conduct in any way. And Plaintiffs cannot meet the third part of this test as the Challenged Orders will never be “enforced” against them.

Fourth, it is debatable whether the threat of a civil lawsuit—not a criminal proceeding, not a suit to impose a statutory penalty, but a garden-variety civil lawsuit—is a legally cognizable injury even for the person being threatened. In *Driehaus* for example, the Court did not decide whether a “burdensome” administrative proceeding would “alone give[] rise to an Article III injury.”¹⁰² The Court found that it was the combination of the proceeding “backed by the additional threat of criminal prosecution” that gave rise to standing in that case.¹⁰³

⁹⁶ See Tex. Gov't Code § 418.173 (noting that the Governor's emergency orders can carry penalties of (1) a fine up to \$1,000 and (2) confinement in jail for up to 180 days).

⁹⁷ See *In re Abbott*, 956 F.3d at 709; *In re Abbott*, 601 S.W.3d 802, 812–13 (Tex. 2020) (acknowledging the State's concession on this issue and finding that the plaintiffs lacked standing as they did not allege from an official with actual enforcement authority, meaning the appropriate local district attorney).

⁹⁸ See Am. Compl. at ¶¶ 56–61.

⁹⁹ 573 U.S. 149 (2014).

¹⁰⁰ *Id.* at 158.

¹⁰¹ *Id.* at 158–67.

¹⁰² *Id.* at 166.

¹⁰³ *Id.*

Plaintiffs are asking for a seemingly unprecedented extension of the federal judiciary's reach. Under their theory, the person threatened with a civil lawsuit will be able to, somewhat illogically, redress that injury by filing their own federal civil lawsuit. Not only that, but any persons tangentially impacted by the threat of civil litigation can also jump into federal court. Plaintiffs, "as the parties asserting federal subject-matter jurisdiction, bear the burden of proving that its requirements are met."¹⁰⁴ Plaintiffs cannot do so here.

Fifth, Plaintiffs cite the Fifth Circuit's decision in *NiGen Biotech L.L.C. v. Paxton* as the "controlling precedent" here.¹⁰⁵ Not so. There, the Attorney General sent letters to NiGen and its retailers identifying NiGen's products as "'false, misleading, or deceptive' in violation of the Texas Deceptive Trade Practices Act ('DTPA')." ¹⁰⁶ These letters "intimat[ed] that formal enforcement was on the horizon for both NiGen and the retailers," and caused the retailers to pull NiGen's products from their shelves, costing "NiGen millions of dollars in lost revenue."¹⁰⁷

The issue was the Attorney General's letters were acting as a "preliminary injunction against the lawful sale of NiGen's products."¹⁰⁸ This situation was further complicated by the Attorney General's longstanding refusal (four years by the time of the Fifth Circuit's decision) "to justify its threatening letters."¹⁰⁹ The Court understandably found that NiGen's injury was redressable.¹¹⁰ In that context, a favorable judicial decision would allow NiGen to "sell its products freely in Texas" and "repair its damaged relationship with its retailers that has resulted from the Attorney General's conduct."¹¹¹

¹⁰⁴ *Willoughby*, 730 F.3d at 479.

¹⁰⁵ ECF 26 at 5.

¹⁰⁶ *NiGen Biotech, L.L.C.*, 804 F.3d at 392.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 397.

¹⁰⁹ *Id.* at 395.

¹¹⁰ *Id.* at 397.

¹¹¹ *Id.*

There are key differences between this case and *NiGen*. In *NiGen*, the Attorney General had specific authority to enforce the DTPA.¹¹² This matters, as the enforcement issue requires that the official has both a “demonstrated willingness to enforce [the statute]” and “the particular duty to enforce the statute in question.”¹¹³ Plaintiffs cannot use *NiGen* as a lever to enjoin an official with no power to enforce the Challenged Orders. That argument is foreclosed by the Supreme Court’s recent decision in *California v. Texas* and over a century’s worth of other caselaw.¹¹⁴

Plaintiffs use the veil of *NiGen* to cover up their true argument: They are asking this Court to enjoin Attorney General Paxton from exercising his *general duty* to uphold Texas state laws. Binding precedent dictates that this “general duty” is insufficient to create the required enforcement connection.¹¹⁵

Another problem for Plaintiffs is that, in *NiGen*, the Attorney General did not contest the traceability of the plaintiff’s injury.¹¹⁶ Thus, *NiGen* has no bearing on the traceability issues here—issues that prove fatal to Plaintiffs’ claims.

Finally, Plaintiffs argue their request for a declaratory judgment itself can confer standing.¹¹⁷ This argument is foreclosed by *California v. Texas*. There, the Court explained: “The Declaratory Judgment Act alone does not provide a court with jurisdiction.”¹¹⁸ The Court continued: “[J]ust like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III’s case-or-controversy requirement.”¹¹⁹

¹¹² See Tex. Bus. & Com. Code § 17.47(a) noting that “the consumer protection division” can “bring an action in the name of the state against the person [violating the DTPA]”; *id.* at § 17.45(8) (defining the “Consumer protection division” as “the consumer protection division of the attorney general’s office”).

¹¹³ See *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020), cert. denied, 141 S. Ct. 1124 (2021) (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)).

¹¹⁴ *Supra* at pgs. 14-15; see also *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) (“[O]ur cases do not support the proposition that an official’s public statement alone establishes authority to enforce a law, or the likelihood of his doing so, for *Young* purposes.”) (quoting *In re Abbott*, 956 F.3d at 709), cert. denied, 141 S. Ct. 1124 (2021).

¹¹⁵ See, e.g., *Tex. Democratic Party*, 978 F.3d at 181; *City of Austin*, 943 F.3d at 999–1000.

¹¹⁶ *NiGen Biotech, L.L.C.*, 804 F.3d at 396.

¹¹⁷ ECF 26 at 8.

¹¹⁸ 141 S. Ct. at 2115.

¹¹⁹ *Id.*

The idea is that remedies “operate with respect to specific parties,” as opposed to “legal rules in the abstract.”¹²⁰ “[I]t must be the effect of the court’s judgment on the defendant that redresses the plaintiff’s injury, whether directly or indirectly.”¹²¹ Thus, when “defendant officials do not enforce the [challenged statute], a declaratory judgment would not meet the requirement of redressability.”¹²² If the plaintiff’s desire to obtain favorable judicial precedent on a legal question was alone enough to confer standing, “then the federal courts would be busy indeed issuing advisory opinions that could be invoked as precedent in subsequent litigation.”¹²³

In sum, Plaintiffs have no meaningful claim to standing against Attorney General Paxton. Plaintiffs face similar problems in their claim to standing against Governor Abbott, the TEA, and Commissioner Morath, so these other Defendants will be given less attention.

Governor Abbott: The arguments identified above apply with greater force to Governor Abbott. Plaintiffs do not allege that Governor Abbott has an enforcement connection to the August 5th Guidance.¹²⁴ Thus, they lack standing to sue him over this order. Like Attorney General Paxton, Governor Abbott also does not enforce emergency executive orders.¹²⁵ Plaintiffs confuse the “power to enact” with the “power to enforce,” a key difference in the justiciability context because, again, remedies “operate with respect to specific parties,” as opposed to “legal rules in the abstract.”¹²⁶ If the law was otherwise, a plaintiff could haul members of Congress into federal court every time they

¹²⁰ *Id.*

¹²¹ *Digital Recognition Network, Inc.*, 803 F.3d at 958 (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005)) (emphasis omitted).

¹²² *Id.* at 959; see also *Bronson*, 500 F.3d at 1112.

¹²³ *Digital Recognition Network, Inc.*, 803 F.3d at 958–59.

¹²⁴ See Am. Compl. at ¶ 28; ECF 26 at 8–9.

¹²⁵ See *In re Abbott*, 956 F.3d at 709; *6th St. Bus. Partners LLC v. Abbott*, 1:20-CV-706-RP, 2020 WL 4274589, at *5 (W.D. Tex. July 24, 2020).

¹²⁶ *California v. Texas*, 141 S. Ct. at 2115; see also *In re Abbott*, 956 F.3d at 709 (“The power to promulgate law is not the power to enforce it.”); cf. *Tex. Democratic Party v. Hughs*, 20-50667, 2021 WL 2310010, at *2 n.5 (5th Cir. June 4, 2021) (“A reasonable person could argue that it makes little sense to be unable to sue the official who caused the problem in question, but we are bound to follow the relevant precedents and, therefore, do not address this point further.”).

enacted a statute the plaintiff did not like.¹²⁷ GA-38 “does not specifically task Governor [Abbott] with its enforcement, or suggest that he will play any role at all in its enforcement,” and thus “Governor [Abbott] is not a proper defendant.”¹²⁸

Plaintiffs claim that Governor Abbott is “enforcing” GA-38 through threats of civil lawsuits.¹²⁹ As explained above, this is insufficient to create an enforcement connection. Also, Plaintiffs do not appear to claim that Governor Abbott is making these threats himself, or that he ever has (or ever will) file such a suit in his official capacity.¹³⁰ Instead, Plaintiffs claim, with no real support, that “[Governor Abbott] is collaborating with and supporting the Attorney General’s enforcement campaign.”¹³¹ If statements of support were sufficient to create standing, then every public official with a Twitter account will inevitably be hauled into federal court at some point.

TEA Defendants: Plaintiffs try to connect TEA Defendants to the enforcement of both Challenged Orders. For clarity, the standing issues for these orders are analyzed separately.

GA-38: In their Amended Complaint, Plaintiffs do not allege any facts connecting either of the TEA Defendants to GA-38’s enforcement.¹³² Plaintiffs allege no facts suggesting TEA Defendants ever have or ever will enforce GA-38.¹³³ In their brief, Plaintiffs sneak in an “enforcement” connection between the TEA Defendants and GA-38’s mask provisions.¹³⁴ But their argument amounts to a mere legal conclusion and, regardless, “a lawyer’s statement in a . . . brief is no substitute for adequately pleaded facts in a complaint, and a memorandum cannot provide allegations that are wholly absent

¹²⁷ See *Jacobson*, 974 F.3d at 1257 (“If rulemaking authority were sufficient to establish traceability, plaintiffs could presumably also challenge a law by suing the legislators who enacted it instead of the officials who execute it. Although in many cases the same official will both make and execute a challenged regulation, that arrangement is not present here.”).

¹²⁸ See *Morris*, 739 F.3d at 746.

¹²⁹ ECF 26 at 8–9.

¹³⁰ See ECF 26 at 8–9; Am. Compl. at ¶¶ 56–61.

¹³¹ ECF 26 at 8.

¹³² See, e.g., Am. Compl. ¶¶ 7, 9, 29–30, 51, 56–61.

¹³³ See *id.*

¹³⁴ ECF 26 at 10.

from the Amended Complaint.”¹³⁵ Given that the Plaintiffs’ have failed to demonstrate an enforcement connection, any injunction against TEA Defendants will amount to an advisory opinion.¹³⁶

Also, to have standing, Plaintiffs must show the threat of future enforcement from TEA Defendants is “substantial.”¹³⁷ Plaintiffs alleged no facts on this point. In sum, Plaintiffs do not have standing to challenge GA-38 against TEA Defendants.

August 5th Guidance: Plaintiffs’ claim to standing against the August 5th Guidance is fatally flawed. As with GA-38, TEA Defendants have never enforced, or threatened to enforce, the August 5th Guidance against any person or entity,¹³⁸ and Plaintiffs do not allege otherwise. Thus, they cannot show the required “substantial” threat of future enforcement.¹³⁹ And enjoining TEA Defendants from enforcing the August 5th Guidance would be meaningless. The August 5th Guidance merely states what GA-38 requires.¹⁴⁰ And truthfully describing the law to school districts certainly does not create a justiciable controversy, at least not on the facts before this Court.

Finally, Plaintiffs face a ripeness problem. “A claim is not ripe for review if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”¹⁴¹ At the time Plaintiffs filed their Complaint,¹⁴² it was unclear if or how TEA Defendants would enforce

¹³⁵ *In re PHP Healthcare Corp.*, 128 Fed. Appx. 839, 847 (3d Cir. 2005); *see also* 2 Moore’s Federal Practice, § 12.34[2] (Matthew Bender 3d ed.) (“The court may not . . . take into account additional facts asserted in a memorandum . . . because such memoranda do not constitute pleadings under Rule 7(a).”); *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a defendant’s motion to dismiss.”).

¹³⁶ *California v. Texas*, 141 S. Ct. at 2116 (finding a lack of standing because the Court could not enjoin who lacks power to enforce the challenged statute against the plaintiffs).

¹³⁷ *Driehaus*, 573 U.S. at 158.

¹³⁸ Aghazadian Decl. at ¶ 8.

¹³⁹ *Driehaus*, 573 U.S. at 158.

¹⁴⁰ Compare Ex. A at 1, with Ex. D.

¹⁴¹ *United States v. Magana*, 837 F.3d 457, 459 (5th Cir. 2016) (quoting *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (quotations omitted)).

¹⁴² *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) (“As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint, and subsequent events do not deprive the court of jurisdiction.”).

the August 5th Guidance, which does not identify a specific enforcement mechanism or penalty.¹⁴³ Post-filing events have further clouded the issue, as the August 5th Guidance has been rescinded, and its offending provision—the one restating what GA-38 says about masks—is no longer in effect.¹⁴⁴ Thus, in addition to lacking standing, Plaintiffs’ claim is unripe. They also face a mootness problem as the August 5th Guidance is no longer in effect.¹⁴⁵

Ultimately, Plaintiffs lack standing against all named Defendants. This Court should dismiss this suit for lack of jurisdiction.

II. Plaintiffs’ American Rescue Plan Act and Americans with Disabilities Act Claims are Barred by Sovereign Immunity.

A state’s sovereign immunity can be overcome in three ways: (1) a clearly stated waiver or consent to suit by the state; (2) a valid abrogation by Congress; or (3) the *Ex parte Young* exception.¹⁴⁶

In their brief, Plaintiffs argue that Defendants’ sovereign immunity has been waived for the Section 504 claim, an issue Defendants do not dispute at this stage.¹⁴⁷ Plaintiffs’ brief clarifies that they rely on the *Ex parte Young* exception for their ARPA and ADA claims.¹⁴⁸ To be entitled to this exception, “the plaintiff at least must show the defendant has ‘the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.’”¹⁴⁹ As detailed above, Plaintiffs have not shown that Defendants had the requisite enforcement connection with the Challenged Orders.¹⁵⁰ The same analysis applies here.

¹⁴³ See Ex. A.

¹⁴⁴ Aghazadian Decl. at ¶¶ 6–11; Exs. B–C.

¹⁴⁵ See, e.g., *United States v. Harris*, 960 F.3d 689, 695 (5th Cir. 2020) (“Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review.”); *Rocky v. King*, 900 F.2d 864, 866 (5th Cir. 1990) (“The mootness doctrine requires that the controversy posed by the plaintiff’s complaint be ‘live’ not only at the time the plaintiff files the complaint but also throughout the litigation process.”).

¹⁴⁶ See *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990); *Ex parte Young*, 209 U.S. 123 (1908).

¹⁴⁷ ECF 26 at 3.

¹⁴⁸ *Id.* at 4–11.

¹⁴⁹ *Tex. Democratic Party*, 978 F.3d at 179 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)).

¹⁵⁰ *Supra* at pgs. 14–23.

RULE 12(b)(6) ARGUMENTS

I. Plaintiffs Failed to Plead a Plausible Section 504 Claim.

Plaintiffs assert disability discrimination and failure-to-accommodate claims under Section 504.¹⁵¹ Both are insufficiently pled.

To establish a *prima facie* case for disability discrimination under Section 504, a plaintiff must show: (1) a qualifying disability; (2) that the plaintiff is being excluded from participation in, denied the benefits of, or otherwise discriminated against by a covered entity; and (3) such discrimination is solely by reason of the plaintiff's disability.¹⁵² "Discrimination includes a failure to make accommodations."¹⁵³ To establish a *prima facie* reasonable accommodation claim under Section 504, the plaintiff must have either (1) identified his disability and resulting limitation and requested an accommodation in direct and specific terms, or (2) his disability, the resulting limitation, and the necessary reasonable accommodation must have been "open, obvious, and apparent" to the entity's relevant agents.¹⁵⁴

To the extent Plaintiffs contend they were discriminated against due to their disabilities in a manner other than through a failure to accommodate, their claim fails for three reasons.

First, Plaintiffs do not plausibly allege that Defendants excluded them from participation in school, denied them the benefits of education, or otherwise discriminated against them. Defendants are not excluding Plaintiffs from attending school. Plaintiffs are free to attend school. It is their fear of COVID-19 that is posing the barrier. And Plaintiffs are free to engage in the interactive process with their respective schools to identify accommodations that would mitigate the risk of COVID-19

¹⁵¹ Am. Compl. at ¶¶ 90-91.

¹⁵² *Francois v. Our Lady of the Lake Hospital, Inc.*, 8 F.4th 370, 378 (5th Cir. 2021) (citing *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 574 (5th Cir. 2018)); *Smith v. Harris Cnty., Tex.*, 956 F.3d 311, 316 (5th Cir. 2020) (discussing the difference between the Rehabilitation Act "solely by reason of" causation standard and the ADA "by reason of" causation standard).

¹⁵³ *Campbell v. Lamar Institute of Tech.*, 842 F.3d 375, 380 (5th Cir. 2016).

¹⁵⁴ *Id.* (citing *Smith v. Harris Cnty.*, 956 F.3d 311, 317 (5th Cir. 2020) and *Windham v. Harris Cnty.* 875 F.3d 229, 236 (5th Cir. 2017)).

to assuage their fears. But there is a fundamental disconnect between Defendants' alleged actions and the purported exclusion from programming by the school districts providing that programming.

Second, Plaintiffs did not plausibly allege that the purported exclusion is solely due to their disabilities. In fact, Plaintiffs do not allege that they missed a single day of school due to the Challenged Orders.¹⁵⁵ Even if they did amend their Complaint again to fix this error, they would still run into the problem of showing exclusion solely due to their disabilities, as opposed to COVID-19 generally. To the extent Plaintiffs contest Defendants' enactment of the Challenged Orders, they did not plausibly allege that Defendants issued these orders solely because of Plaintiffs' disabilities or that Defendants were motivated by Plaintiffs' disabilities.

Third, Plaintiffs have not been denied "meaningful access" to an education, as is required to support their claims.¹⁵⁶ The Challenged Orders left Plaintiffs free to attend school in person while wearing masks and engaging in any other COVID-19 precautions they deem appropriate. If Plaintiffs did not want to attend school in person, the Challenged Orders left Plaintiffs free to make that choice, as the orders contain no restrictions on Plaintiffs' ability to attend school virtually or on local schools' ability to offer this service. This point is highlighted by the fact that Plaintiffs could not identify a single instance where they missed school due to the Challenged Orders.

To the extent Plaintiffs rely on failure-to-accommodate as discrimination, their claim fares no better. "A critical component of a Title II claim for failure to accommodate . . . is proof that the disability and its consequential limitations were known by the entity providing public services."¹⁵⁷ "Mere knowledge of the disability is not enough; the service provider must also have understood the limitations the plaintiff experienced . . . as a *result* of that disability."¹⁵⁸ "The burden falls on the plaintiff

¹⁵⁵ See Am. Compl. at ¶¶ 63–76.

¹⁵⁶ See, e.g., *Ruskai v. Pistole*, 775 F.3d 61, 78–79 (1st Cir. 2014) (citing *Alexander v. Choate*, 469 U.S. 287, 299 (1985)).

¹⁵⁷ *Windham*, 875 F.3d at 236 (internal quotations omitted).

¹⁵⁸ *Id.* (internal quotations omitted, emphasis in original).

to specifically identify the disability and resulting limitations, and to request an accommodation in direct and specific terms.”¹⁵⁹

“Once a qualified individual with a disability requests reasonable accommodations, the public entity has an obligation to engage in an interactive process to determine the best means of accommodating the plaintiff’s disability.”¹⁶⁰ In reviewing such requests, “[a]n institution is not duty bound to acquiesce in and implement every accommodation a disabled student demands.”¹⁶¹ Put simply, the student “is not entitled to his preferred accommodation” so long as the offered accommodation is reasonable.¹⁶²

Here, Plaintiffs did not allege that they submitted a request for an accommodation for a known disability in direct and specific terms for Defendants to review, consider, and respond with alternative accommodations. This omission, while fatal to Plaintiffs’ claim, is also understandable because such requests would be virtually nonsensical when directed to the Governor, the Attorney General, or even the TEA. It is the various schools and school districts who can engage in the interactive process with Plaintiffs, as only they can review direct and specific requests for particularized limitations and offer reasonable accommodations to address those limitations—all of which will be based on the needs of the requestor and the resources of the recipient. At its core, there is a fundamental disconnect between the essence of a failure-to-accommodate claim—the interactive process and reasonableness of the offers extended by participants thereto—and Plaintiffs’ choice of defendants—state policymakers sued for enacting state policy.

Also, to present a viable accommodation claim, Plaintiffs’ requested accommodation must be “reasonable.” But Plaintiffs’ proposed accommodation is not. GA-38 seeks to establish a uniform

¹⁵⁹ *Id.* (internal quotations omitted).

¹⁶⁰ See *Shrub v. Univ. of Tex. Health Sci. Ctr. at Houston-Sch. of Med.*, 63 F. Supp.3d 700, 708–09 (S.D. Tex. 2014) (citing *Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 315 (5th Cir. 2007); see also *Campbell*, 842 F.3d at 379–82.

¹⁶¹ *Campbell*, 842 F.3d at 381.

¹⁶² *Id.* at 382.

policy leaving the decision to wear or not wear a mask up to each student (and their parents). Plaintiffs' requested accommodation, however, is that every school must *mandate* the wearing of masks, overriding the students (and their parents') choice. Changing GA-38's "no mask mandate" to a "mask mandate" would "fundamentally alter" the policy choice set forth in GA-38, and thus it is not a reasonable accommodation.¹⁶³

Finally, Plaintiffs do not qualify for the limited exception that can, in narrow circumstances, waive their need to request an accommodation. "When a plaintiff fails to request an accommodation [in direct and specific terms], he can prevail only by showing that the disability, resulting limitation, and necessary reasonable accommodation were open, obvious, and apparent to the entity's relevant agents."¹⁶⁴ "Knowledge of a disability is different from knowledge of the resulting limitation."¹⁶⁵ "And it is certainly different from knowledge of the necessary accommodation."¹⁶⁶ "To prevail, [Plaintiff] must adduce evidence that all three were or should have been obvious."¹⁶⁷ Here, Plaintiffs did not plausibly allege that Defendants knew of their "disabilit[ies] and [their] consequential limitations," a prerequisite to their failure-to-accommodate claim.¹⁶⁸

II. Plaintiffs Failed to Plead a Viable ADA Claim.

As Plaintiffs acknowledged, Section 504 and ADA claims are generally analyzed under the same standard.¹⁶⁹ Plaintiffs' ADA claim fails for the same reasons as its Section 504 claim.

III. Plaintiffs Failed to State a Claim under the American Rescue Plan Act.

Plaintiffs' ARPA claim fails as they do not have a private right of action to bring this claim.¹⁷⁰

¹⁶³ *Id.*

¹⁶⁴ *Windham*, 875 F.3d at 236 (internal quotations omitted).

¹⁶⁵ *Id.* at 238.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 238.

¹⁶⁸ See *Cadena v. El Paso Cty.*, 946 F.3d 717, 723–24 (5th Cir. 2020).

¹⁶⁹ ECF 7 at 16.

¹⁷⁰ *Webb v. Texas Higher Education Coordinating Bd., Co.* EP-14-CV-00345-FM, 2014 WL 12594193, at *12 (W.D. Tex., Dec. 12, 2014) (dismissing claim under Rule 12(b)(6) where statutory provision provided no private right of action).

Private rights of action to enforce federal law must be created by Congress.¹⁷¹ Courts must determine whether Congress intended the statute to create both a private right, and a private remedy.¹⁷² Absent statutory intent, courts may not create such private rights and remedies, “no matter how desirable that might be as a policy matter, or how compatible with the statute.”¹⁷³

The ARPA does not create a private cause of action.¹⁷⁴ Likewise, the Supremacy Clause does not create any federal rights, or a private cause of action.¹⁷⁵ Plaintiffs have no right of action to bring an ARPA claim. Without a private right of action, Plaintiffs cannot state a plausible ARPA claim.

RESPONSE TO PLAINTIFFS’ APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs’ claims are meritless, most notably due to their glaring standing problems. This Court should deny their request for a temporary restraining order against the Challenged Orders.

A party moving for temporary restraining order must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable harm absent the requested order; (3) that the threatened injury outweighs any damage that the temporary restraining order might cause the defendant; and (4) that the temporary restraining order will not disserve the public interest.¹⁷⁶ These requirements mirror those of a preliminary injunction.¹⁷⁷ A temporary restraining order is an extraordinary remedy that should not be granted unless the requesting party has clearly carried the burden of persuasion on all four requirements.¹⁷⁸

¹⁷¹ *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

¹⁷² *Id.* (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)).

¹⁷³ *Id.* (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985); *Transamerica*, 444 U.S. at 23; *Touche Ross*, 442 U.S. at 575-56).

¹⁷⁴ *Anthony Lamar ADC #120479 v. ASA Hutchison, et al.*, No. 4:21-CV-00529, 2021 WL 4047158 at * 6, n. 47 (E.D. Ark. Sep. 3, 2021).

¹⁷⁵ *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (“[T]he Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action”) (internal quotations and citations omitted); *see also Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979); *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov’t*, 849 F.3d 615, 626 (5th Cir. 2017).

¹⁷⁶ *Whole Woman’s Health v. Paxton*, 264 F.Supp.3d 813, 818 (W.D. Tex. 2017) (internal citations omitted).

¹⁷⁷ *Id.*

¹⁷⁸ *PCI Transp., Inv. v. Fort Worth & W.R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

Likelihood of Success: The likelihood of success on the merits was analyzed above. Plaintiffs will not succeed on the merits of their claims.

Irreparable Harm & Balance of the Equities: “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”¹⁷⁹ Exercising caution is especially important where the defendant is itself a state actor because of the federalism concerns attendant to a federal court intervening in a state’s conduct of its own laws.¹⁸⁰ The State’s interest in ensuring compliance with its laws weighs heavily in a court’s balancing of the equities in the injunction context.¹⁸¹ “[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”¹⁸²

Defendants, and most notably Attorney General Paxton, are trying to stop the widespread defiance of GA-38 by local officials. Ensuring that state law is not undermined by local officials is an important state interest, one that would be undermined by Plaintiffs’ requested temporary restraining order.

Public Interest: Plaintiffs’ request, which is to force everyone to wear masks, must be weighed against other individuals’ desire to be able to make that choice for themselves. This issue is particularly glaring for individuals who may not be able to wear masks due to their own disabilities or medical concerns, an issue not addressed by Plaintiffs.

Also, Plaintiffs’ proposed restraining order would upset, rather than maintain, the status quo. As set forth in the Texas Supreme Court’s recent Order, the status quo regarding mask mandates in

¹⁷⁹ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

¹⁸⁰ See *Gibson*, No. 16-354-SDD-RLB, 2016 WL 5796897, at *2 (M.D. Lou. 2016); *Parrott v. Livingston*, No. 6:15cv866, 2016 WL 4487918, at *1 (E.D. Tex. 2016); see also *Machete Prods., L.L.C.*, 809 F.3d 281, 288 (5th Cir. 2015) (quoting *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426, 431 (1948)).

¹⁸¹ See *Texas v. Ysleta Sur del Pueblo*, 955 F.3d 408, 415 (5th Cir. 2020) (“Although the Tribe has an interest in self-governance, the Tribe cannot satisfy that interest by engaging in illegal activity,” and allowing ongoing operations of an illegal casino “would countenance ongoing violations” of Texas law.).

¹⁸² *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (citations omitted)).

Texas has been that such mandates have been at the discretion of Governor Abbott.¹⁸³ Plaintiffs' proposed restraining order would upset the status quo of who ultimately controls COVID-19-related decisions for the State of Texas. Also, any such order would place this Court fundamentally at odds with the Texas Supreme Court which, again, said the status quo favors the State in this context.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court: (1) deny Plaintiffs' request for a temporary restraining order; (2) grant Defendants' motion to dismiss; and (3) award Defendants such further relief as the Court deems just and proper.

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¹⁸³ <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=f69537ef-cd47-46d7-a457-42f201955c6a&coa=cossup&DT=STAY%20ORDER%20ISSUED&MediaID=46ddfec0-7bd9-455e-8521-9dcb86fb4b0e> (last visited 09/12/2021).

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CERTIFICATE OF SERVICE

I certify that on September 13, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Todd Dickerson

Todd Dickerson

Assistant Attorney General

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VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned notary, on this day personally appeared Carlos G. Lopez, the affiant, a person whose identity is known to me. After I administered the oath to affiant, he testified as follows:

1. "My name is Carlos G. Lopez. I am over 18 years of age, of sound mind, and can make this affidavit. The facts in this affidavit are within my personal knowledge and are true and correct."

2. "I am a Partner with the law firm Thompson & Horton, LLP. I represent the Relators in this original proceeding. The Mandamus Record contains true and correct copies of every document that is material to the Relators' claim for relief and was filed in the underlying proceeding in the 368th Judicial District Court of Williamson County, Texas."


3. "In accordance with Tex. R. App. P. 52.7(a)(2), I certify that no testimony was adduced in the underlying proceeding in connection with the matter complained."



CARLOS G. LOPEZ

Subscribed and sworn to me on this the 17th day of September, 2021.





Notary Public in and for the State of
Texas

My commission expires: 9/19/2022

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